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v. 2464

No. 11555

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 330, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 5 1947

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
in and for the Southern District of California

Central Division

No. 19106 Crim.

UNITED STATES OF AMERICA,

Plaintiff

vs.

WEST COAST SUPPLY COMPANY, a partnership,
and PAUL J. ZIEGLER,

Defendants

INFORMATION

(U. S. C., Title 50, App., §633, et seq.; 2d War Powers Act of 1942; General Ration Order No. 8; 3d Revised Ration Order No. 3.)

The United States Attorney charges:

COUNT ONE

(U. S. C., Title 50, App., §633, et seq.; 3d Revised Ration Order No. 3, §15.7(d))

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7(d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Union Sugar Company a sugar

and on behalf of [J. F. T. O'C. Judge]
ration check drawn by ^ the said West Coast Supply Com-
and Paul J. Ziegler [J. F. T. O'C. Judge]
pany ^ in the amount of Six Hundred Thousand (600,000)
pounds of sugar, on the Union Bank and Trust Company
of Los Angeles, when the West Coast Supply Company
had a balance in its accounts at said bank in an amount
insufficient to cover the amount of said check. [2]

COUNT TWO

(U. S. C., Title 50, App., §633, et seq.; General Ration
Order No. 8, §§~~2.8~~ and 2.9)

From on or about July 3, 1946, to on or about August
17, 1946, in Los Angeles County, California, within the
Central Division of the Southern District of California,
defendants, West Coast Supply Company, a partnership,
and Paul J. Ziegler, wilfully and unlawfully performed
at

an act prohibited by Sections ~~2.8~~ and 2.9 of General Ration
Order No. 8, in that said defendants did wilfully and un-
lawfully receive a rationed commodity, Three Hundred
and eighty Thousand (380,000) pounds of sugar from
the Union Sugar Company, in exchange for a ration docu-

[J. F. T. O'C. Judge] and on behalf of
ment, to wit, a sugar ration check drawn by ^ the said
[J. F. T. O'C. Judge] and Paul J. Ziegler

West Coast Supply Company ^ in the amount of Six Hun-
dred Thousand (600,000) pounds of sugar, on the Union
Bank and Trust Company of Los Angeles, dated July 1.
1946, and issued by the defendants, when said defendants
knew and had reason to believe that the said ration docu-
ment was not validly issued because the said West Coast

Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check. [3]

COUNT THREE

(U. S. C., Title 50, App. §633, et seq.; 3d Revised Ration Order No. 3, §15.7(d))

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7(d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Spreckles Sugar [J. F. T. O'C. Judge] and on behalf of Company a sugar ration check drawn by \wedge the said West [J. F. T. O'C. Judge] and Paul J. Ziegler Coast Supply Company \wedge in the amount of Thirty Thousand (30,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check. [4]

COUNT FOUR

(U. S. C., Title 50, App. §633, et seq.; General Ration Order No. 8, §§~~2.8~~ and 2.9)

On or about July 2, 1946, in Los Angeles County, California, within the Central Division of the Southern Dis-

trict of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and un-

Ac

lawfully performed an act prohibited by Sections 2.8 and 2.9 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Thirty Thousand (30,000) pounds of sugar from the Spreckles Sugar Company, in exchange for a ration

[J.F. T. O'C. Judge] and on behalf of

document, to wit, a sugar ration check drawn by ^ the said

[J. F. T. O'C. Judge] and Paul J. Ziegler

West Coast Supply Company ^ in the amount of Thirty Thousand (30,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check. [5]

COUNT FIVE

(U. S. C., Title 50, App., §633, et seq.; 3d Revised Ration Order No. 3, §15.7(d))

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7(d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the

amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Holly Sugar Company [J. F. T. O'C. Judge] and on behalf of company a sugar ration check drawn by \wedge the said West Coast and Paul J. Ziegler [J. F. T. Judge] Supply Company \wedge in the amount of Six Hundred and Sixty Thousand (660,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check. [6]

COUNT SIX

(U. S. C., Title 50, App., §633, et seq.; General Ration Order No. 8, §§~~2.8~~ and 2.9)

From on or about July 1, 1946, to on or about August 30, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed

Ac

an act prohibited by Sections ~~2.8~~ and 2.9 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Six Hundred and Sixty Thousand (660,000) pounds of sugar from the Holly Sugar Company, in exchange for a ration docu-

[J. F. T. O'C. Judge] and on behalf of ment, to wit, a sugar ration check drawn by \wedge the said [J. F. T. O'C. Judge] and Paul J. Ziegler West Coast Supply Company \wedge in the amount of Six Hun-

dred and Sixty Thousand (660,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check. [7]

COUNT SEVEN

(U. S. C., Title 50, App., §633, et seq.; 3d Revised Ration Order No. 3, §15.7(d))

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7(d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the C & H Sugar Company a sugar and on behalf of [J. F. T. O'C. Judge] ration check drawn by ^ the said West Coast Supply Company and Paul J. Ziegler [J. F. T. O'C. Judge] ^ in the amount of Eighty Thousand (80,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check. [8]

COUNT EIGHT

(U. S. C., Title 50, App., §633, et seq.; General Ration Order No. 8, §§~~2.8~~ and 2.9)

On or about July 5, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and un-

Ac

lawfully performed an act prohibited by Sections ~~2.8~~ and 2.9 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Eighty Thousand (80,000) pounds of sugar from the C & H Sugar Company, in exchange for a ration docu-

and on behalf of

ment to wit, a sugar ration check drawn by ^ the said and Paul J. Ziegler

West Coast Supply Company ^ in the amount of Eighty Thousand (80,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check.

JAMES M. CARTER

United States Attorney

ARTHUR LIVINGSTON

Assistant U. S. Attorney

Chief of Criminal Division

[Minutes: Monday, January 13, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for arraignment and plea of defendants West Coast Supply Company and Paul J. Ziegler; W. H. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. Carr, Esq., appearing as counsel for the co-partnership:

Defendant Ziegler, who is present on his own recognizance, states his true name is as set forth in the Information; and Attorney Carr states that the name of the defendant company is as set forth in the Information. Attorney Carr waives reading of the charge and it is ordered that the cause is hereby continued to Jan. 20, 1947, at 10 A. M. for plea. [10]

[Minutes: Monday, January 20, 1947.]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for (1) hearing motion of defendants filed Jan. 15, 1947, to dismiss the Information, (2) motion of the Government filed Jan. 16, 1947, to strike motion of defendants; (3) plea of each defendant; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Chas. H. Carr and Mildred L. Kluckhohn, Attorneys, appearing as counsel for the defendants; defendant Paul J. Ziegler being present on his own recognizance:

Attorney Carr presents (1) motion of defendants to dismiss the Information and the said motion is denied. Attorney Strong presents (2) motion of the Government to strike defendants' motion, and the said motion is denied.

In behalf of the defendant partnership Attorney Carr enters plea of not guilty to all eight counts. Defendant Ziegler pleads not guilty to all eight counts. It is ordered that the cause is hereby set for trial on Feb. 4, 1947, at 10 A. M., before Judge O'Connor. [13]

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND

Please Take Notice That on February 4, 1947, at 10:00 A. M., or as soon thereafter as counsel can be heard, the undersigned will move the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California, Central Division, for permission to amend the Information in this cause heretofore filed, in each and every count, so that the words "* * * a sugar ration check drawn by the said West Coast Supply Company * * *", appearing in each and every count of said Information, shall read "* * * a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler * * *."

JAMES M. CARTER

United States Attorney

HOWARD V. CALVERLEY

Chief, Criminal Division

Assistant U. S. Attorney

WILLIAM STRONG

Assistant U. S. Attorney

Attorneys for Plaintiff.

By William Strong

Assistant U. S. Attorney

[Endorsed]: Filed Feb. 4, 1947. [14]

[Minutes: Tuesday, February 4, 1947.]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for jury trial of the defendants West Coast Supply Company and Paul J. Ziegler; Wm. Strong, Esq., Asst. U. S. Attorney, appearing for the Government; Charles H. Carr and Mildred L. Kluckhohn, Attorneys, appearing for the defendants:

It is ordered that a jury be impaneled for the trial of this cause, whereupon the clerk draws the names of the following twelve jurors, who take their seats in the jury box: Mrs. Lillian H. Atlee, Alice Martin Smith, Catherine Ward, Abraham Copeland, Cornelia Kimball Murray, Dolly Esther Merkley, Donald Charles Ingersoll, Edward B. Lilly, William E. Green, Harold Alfred Sterling, Homer Clay Smith, Arthur Norman Fernald.

Attorney Strong moves to amend the information and the motion is granted.

* * * * * [15]

[Minutes: Friday, February 7, 1947.]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for further jury trial of the defendants West Coast Supply Company and Paul J. Zeigler; William F. Strong, Esq., Asst. U. S. Attorney, appearing for the Government; Charles H. Carr, Esq., and

Mildred L. Kluckhohn appearing for the defendants; the defendant Zeigler and the jury being present and so stipulated:

* * * * *

James R. Barry, heretofore sworn, is called in rebuttal as a witness for the Government and testifies on direct examination by Attorney Strong. The Government rests in rebuttal at 2:52 P. M.

At 3 P. M. the jury is admonished and excused until next Monday, at 1:30 P. M. In the absence of the jury Attorney Strong argues a point of law.

The Court states that no case has been made against the defendant West Coast Supply Co. or the other members of the partnership; and the motion of Attorney Carr for a directed verdict of acquittal against the said West Coast Supply Co. is granted as to all counts against the said defendant.

Attorney Carr renews his motion for a judgment of acquittal on each count of the Information against defendant Paul J. Zeigler and argues in support thereof, and the said motion is denied and exception noted.

At 3:30 P. M. court recesses. At 4:20 P. M. court reconvenes herein and all being present as before including Defendant Zeigler, the jury still being absent, the Court makes a statement relative to the proposed instructions to the jury, and a general discussion takes place relative to the proposed instructions to be given to the jury.

At 5:40 P. M. the Court declares a recess in this trial until 1:30 P. M., February 10, 1947. [16]

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED INSTRUCTIONS

Come now the defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, in the above-entitled case now on trial and request the Court to give the following instructions to the jury.

CHARLES H. CARR

Attorney for Defendants, West Coast Supply Company,
a partnership, and Paul J. Ziegler. [17]

Defendants' Requested Instruction No. 1

You are instructed that the law does not require the defendants to prove their innocence, which in many cases might be impossible, but, on the contrary, the law requires the Government to establish their guilt by legal evidence and beyond a reasonable doubt.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [18]

Defendants' Requested Instruction No. 2

The presumption of innocence goes with each defendant throughout the whole trial, and during your deliberations, and until you have reached a verdict, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [19]

Defendants' Requested Instruction No. 3

You are instructed that the presumption of innocence with which the defendants are at all times clothed is not a mere form to be disregarded by you at your pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendants the full benefit of this presumption and to acquit them unless the testimony in the case convinces you of their guilt as charged beyond a reasonable doubt.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [20]

Defendants' Requested Instructed No. 4

You are instructed that the Information on file herein is a mere charge or accusation against the defendants, and is not any evidence of the defendants' guilt, and no juror in this case should permit herself, or himself, to be, to any extent, influenced or prejudiced against the defendants because of or on account of such Information.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [21]

Defendants' Requested Instruction No. 5

From time to time during this trial, counsel for the various defendants has interposed objections to evidence, some of which the Court has sustained and some has over-

ruled. With reference to this, I instruct you that it is not merely the privilege but the duty of an attorney to make such objections whenever he believes they are well founded in law. This occurs in the trial of every law suit, and you are not permitted to draw any inference unfavorable to the defendants from either the fact that the objections were made or from the rulings of the Court.

You must not consider for any purpose any evidence offered and rejected or which has been stricken by the Court. If the Court had admitted evidence for a limited purpose or limited its consideration to only one of the defendants, you should confine your consideration of that evidence within the limitations placed upon it by the Court. And you should consider that evidence against only that defendant respecting whom it was admitted—not against any defendant concerning whom it was excluded or rejected.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [22]

Defendants' Requested Instruction No. 6

The jury is the sole and exclusive judge of the effect and value of the evidence addressed to it and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelli-

gence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury is the exclusive judge of the credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial, or that he has been convicted of crime.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [23]

Defendants' Requested Instruction No. 7

[Out See Par. 2 and 19]

Under the law no jury should, or has the right to convict a defendant of a crime upon mere suspicion, however strong, nor simply because there may be a preponderance of all the evidence in the case against him, nor merely because there is, or may be, strong reasons to suspect that he is guilty; neither are mere probabilities sufficient to warrant a conviction, nor is it sufficient that a greater weight of evidence supports the allegations of the Information, if it does; nor is it sufficient upon the doctrines of chance that it is more probable that the defendant is guilty. Before the defendants can be lawfully convicted, they must be proven to be guilty fairly and satisfactorily beyond all reasonable doubt, so that there is no reason-

able hypothesis upon which they can be considered innocent when all the evidence in the case is considered together.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [24]

Defendants' Requested Instruction No. 8

Neither the filing of an Information, nor any allegation thereof, raises any presumption whatever of the defendants' guilt, but the burden of proof is on the Government, and the law presumes the defendants innocent until proven guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. A reasonable doubt is a doubt which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendants' guilt, you have a reasonable doubt; that if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [25]

Defendants' Requested Instruction No. 9

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendants' innocence you must do so, and, in that case, find the defendants not guilty. You cannot find the defendants guilty unless the evidence before you is inconsistent with and excludes every other reasonable hypothesis except that of guilt. The hypothesis of guilt should flow naturally from facts proved, and be consistent with them all. You cannot find the defendants guilty unless the testimony in the case convinces you of their guilt as charged beyond a reasonable doubt.

Where the evidence is as consistent with the innocence of a defendant as with his guilt, it is the duty of the jury to acquit.

If the evidence supports two theories—both reasonable—one consistent with the guilt of an accused and the other consistent with his innocence, it is the duty of the jury to acquit.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [26]

Defendants' Requested Instruction No. 10

A witness false in one part of his, or her, testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury,

being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but willfully and with the design to deceive, must treat all of his, or her, testimony with distrust and suspicion, and reject all unless they shall be convinced that, notwithstanding the base character of the witness, he or she has in other particulars sworn to the truth.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [27]

Defendants' Requested Instruction No. 11

You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact, or facts. You have not to consider as evidence or law, any argument, comment or suggestion made by counsel during the trial of this action.

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court; such evidence that has been introduced before you and the inferences which you may deduce therefrom as stated in these instructions and upon the law as given you in these instructions.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [28]

Defendants' Requested Instruction No. 12

You cannot find a defendant guilty upon any count of the Information unless you are convinced, beyond a reasonable doubt, by the evidence of the truth of every material allegation of such count.

Given: in my instructs J. F. T. O'C., J.

Refused:

Given as Modified: [29]

Defendant's Requested Instruction No. 13

The Court advises you to find the defendant, West Coast Supply Company, a partnership, not guilty on each and every count of the Information on the ground and for the reason that the Court deems the evidence insufficient to warrant conviction.

Given: J. F. T. O'C., J.

Refused:

Given as Modified: [30]

Defendants' Requested Instruction No. 14

The Court advises you to find the defendant, Paul J. Ziegler, not guilty on each and every count of the Information on the ground and for the reason that the Court deems the evidence insufficient to warrant conviction.

Given:

Refused: J. F. T. O'C., J.

Given as Modified:

[No No] [31]

Defendants' Requested Instruction No. 15

There are two kinds of evidence by which the Government may sustain charges laid in the Information; the one is known as direct and positive, the other as indirect or circumstantial. Evidence is said to be direct and positive when the witnesses have testified of their own knowledge to matters having a direct bearing upon the issues in the case. Evidence is said to be indirect or circumstantial on the other hand when the witnesses testified to matters having only an indirect or circumstantial relationship to the issues in the case.

The prosecution depends in this case for conviction upon circumstantial evidence.

While you may show what a man does by direct evidence of eye-witnesses, the only way you can show what he intends and what his purpose is or was is by circumstantial evidence.

The law requires that all of the circumstances necessary to show guilt must themselves be shown by evidence beyond a reasonable doubt; that these circumstances must all be consistent with one another; that they must all be consistent with a defendant's guilt and that they must all be inconsistent with any reasonable theory of his innocence, and inconsistent with every other reasonable hypothesis except that of guilt.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[OK] [32]

Defendants' Requested Instruction No. 16

You are instructed that the word "issue," within the meaning of each count of the Information, means the delivery of a completed sugar ration check to the person to whose account the check is made payable; and that no check which has been altered may be issued. Even though you may be convinced, beyond a reasonable doubt, that defendant, Paul J. Ziegler, in fact, signed his name to the various sugar ration checks alleged in the Information, you are instructed that defendant, Paul J. Ziegler, could not have issued or caused said checks to have been issued if you find that they were altered by anyone other than the defendant prior to, at the time of or after delivery to the person to whose account the checks were made payable.

Third Revised Ration Order No. 3, Sec. 24-1 (c)
(15).

Third Revised Ration Order No. 3, Sec. 15.7 (f)
(1).

Third Revised Ration Order No. 3, Sec. 15.7 (f)
(2).

Given:

Refused: J. F. T. O'C., J.

Given as Modified:

[No] [33]

Defendants' Requested Instruction No. 17

You are instructed that a sugar ration check may be issued only by a depositor—that is, by a person who has a ration bank account, against his account. Even if you should find beyond a reasonable doubt that defendant,

Paul J. Ziegler, in fact, did issue or cause said sugar ration checks to be issued, you cannot find ~~defendant~~ Paul J. Ziegler guilty unless you are convinced, beyond a reasonable doubt, that he is either a depositor or that he was authorized by defendant West Coast Supply Company to issue checks to be drawn on its account.

Third Revised Ration Order No. 3, Sec. 24.1 (c)
(5).

Third Revised Ration Order No. 3, Sec. 24.1 (c)
(9).

Third Revised Ration Order No. 3, Sec. 15.7 (a)
(b).

Given:

Refused:

Given as Modified:

[Out Withdrawn by def.] [34]

Defendants' Requested Instruction No. 18

In each count of the Information, defendants are alleged to have "wilfully" done the acts and things of which they are accused. As so used, the term "wilfully" denotes an act which is premeditated, deliberate, intentional and knowingly done.

In other words, these are offenses requiring a specific intent, and, unless you find beyond a reasonable doubt that it is a moral certainty that the defendants had such specific intent, you must acquit them. The intent on the part of the defendants may be shown by their acts and declarations and by the circumstances surrounding their acts, which, when taken together, must prove beyond a

reasonable doubt that the defendants had the specific intent to wilfully commit acts denounced under the law.

United States v Fish, Inc., 1946, C.C.A. 2, 154 F. (2d) 798.

Moore v. United States, 1945, C.C.A. 10, 150 F.(2d) 323, e.d. 66 S.Ct. 52.

Zimberg v. United States, 1944, C.C.A. 1, 142 F. (2d) 132, 137.

Flannagan v. United States, 1944, C.C.A. 9, 145 F.(2d) 740.

United States v. Renken, 1944, D.C., S.C., 55 F.Supp. 1.

Given: J. F. T. O'C., J.

Refused:.....

Given as Modified:..... [35]

Defendants' Requested Instruction No. 19

You are instructed that the Office of Price Administration and the powers exercised by it automatically terminated on June 30, 1946 upon the expiration of the Emergency Price Control Act of 1942, as amended, and the Stabilization Act of 1942, as amended, and that it was not until July 25, 1946 that any legislation existed extending price control, the operation of the Office of Price Administration and the exercise of its powers. [Out]

However, on June 30, 1946, on the day the operation of the Office of Price Administration and its powers terminated under the Emergency Price Control Act and the Stabilization Act, President Truman signed Executive Order No. 9745 by which he purported to continue the power to ration on an interim basis pending legislative

action to extend the operation of the Office of Price Administration. Although signed by the President on June 30, 1946, Executive Order No. 9745 was not filed with the Division of Federal Register, as required by statute, until July 1, 1946 at 10:32 a.m., and was not published in the Federal Register until July 2, 1946.

Title 50, U.S.C.A., Sec. 966.

92nd Congressional Record 8092.

11 F.R. 7327.

79th Congress, Second Session, Chapter 671, Public Law 548.

Given:.....

Refused:.....

Given as Modified:.....

[Pass See Gov't—37 New] [36]

Defendants' Requested Instruction No. 20

In each count of the Information, defendants are alleged to have "wilfully" and "unlawfully" done the acts and things of which they are accused. In this connection, you are instructed that there is a very real and vital difference between simply doing an act and doing an act wilfully. In the first case no intent is involved while in the second case of "wilfully" doing the act, the elements of guilty knowledge and specific intent to do that which the law denounces are involved and constitute the gist of the offense.

United States v. Fish, Inc., 1946, C.C.A. 2, 154
F.(2d) 798.

Moore v. United States, 1945, C.C.A. 10, 150
F.(2d) 323, e.d. 66 S.Ct. 52.

Zimberg v. United States, 1944, C.C.A. 1, 142
F.(2d) 132, 137.

Given: J. F. T. O'C., J.

Refused:.....

Given as Modified:..... [37]

Defendants' Requested Instruction No. 21

Since defendants are charged with "wilfully" doing the acts complained of, one of the essential elements of all of the offenses charged in the Information is knowledge on the part of the defendants that they were doing an act denounced by the law. Unless you are convinced beyond a reasonable doubt that defendants were aware of and knew of the existence of Executive Order No. 9745, purporting to extend the power to ration sugar beyond June 30, 1946, then you must acquit the defendants.

Yakus v. United States, 1944, 321 U.S. 414, 435.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Not Given] [38]

Defendants' Requested Instruction No. 22

You are further instructed in this connection that, upon publication of an Executive Order of this kind in the Federal Register, the law of the United States creates a presumption that all persons affected by the order have knowledge of such order, which presumption is a rebuttable one. If, therefore, you find beyond a reasonable doubt that the acts and things of which defendants are accused of doing were done by said defendants, and if you

further find that, at the time said acts and things were done by said defendants, they did not know that the President had signed Executive Order No. 9745 and were unaware that sugar rationing had continued beyond June 30, 1946, then you must find that the presumption of notice of said Executive Order No. 9745 to defendants has been rebutted.

Title 44, U.S.C.A., Sec. 307.

Flannagan v. United States, 1944, C.C.A. 9, 145
F.(2d) 740.

Kempe v. United States, 1945, C.C.A. 8, 151
F.(2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Not Given] [39]

Defendants' Requested Instruction No. 23

You are instructed that the Government and the defendants are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each of you to consider and weigh all the evidence in the case, and from such evidence to determine, if you can, the question of guilt or innocence of the defendants, or any of them. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. If, after careful consideration of all the evidence, your mind is fairly made up, and you are convinced that you are right, it will be your duty to stand by your decision. But

each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be justly drawn therefrom; this it is his duty to do. If, after such a full and fair discussion with them, any juror is still satisfied that his decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision, and render his verdict according to such final decision.

Given: in substance J. F. T. O'C., J.

Refused:.....

Given as Modified:..... [40]

Defendants' Requested Instruction No. 24

The Information upon which the defendants are being tried contains 8 counts. Counts 1, 3, 5 and 7 thereof charge defendants, and each of them, with having wilfully and unlawfully issued and caused to be issued a sugar ration check, each for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued a sugar ration check drawn by and on behalf of said West Coast Supply Company and Paul J. Ziegler when the West Coast Supply Company had a balance in its account in an amount insufficient to cover the amount of each of said checks. The amount of the check in count 1 is 600,000 pounds of sugar; in count 3, 30,000 pounds of sugar; in count 5, 660,000 pounds of sugar; and in count 7, 80,000 pounds of sugar.

The Government is required to prove each and every material allegation of each count of the Information beyond a reasonable doubt. Unless every material allegation of the charge is proved against a defendant, you must acquit that defendant.

Given: J. F. T. O'C., J.

Refused:.....

Given as Modified:.....

[Given] [41]

Defendants' Requested Instruction No. 25

Counts 2, 4, 6 and 8 charge that defendants wilfully and unlawfully received a rationed commodity, to wit, sugar, in exchange for a sugar ration check drawn by and on behalf of the West Coast Supply Company and Paul J. Ziegler on the Union Bank and Trust Company of Los Angeles, and issued by the defendants when the said defendants knew and had reason to believe that the check was not validly issued because the West Coast Supply Company did not have a sugar ration bank account in said bank with a balance sufficient to cover the amount of the check.

Count 2 charges the receipt of 380,000 pounds of sugar; count 4, 30,000 pounds of sugar; count 6, 660,000 pounds of sugar; and count 8, 80,000 pounds of sugar.

The Government is required to prove each and every material allegation of each count of the Information beyond a reasonable doubt. Unless every material allegation of the charge is proved against a defendant, you must acquit that defendant.

Given: J. F. T. O'C., J.

Refused:.....

Given as Modified:.....

[G] [42]

Defendants' Requested Instruction No. 26

If, from all of the evidence, you should conclude that the name West Coast Supply Company was not placed upon Exhibit 6, which is the check set forth in count 1; Exhibit 5, which is the check set forth in count 3; Exhibit 4, which is the check set forth in count 5; and Exhibit 3, which is the check set forth in count 7, by the defendant Paul J. Ziegler, then you must find that said check or checks is not a ration check as defined by Sec. 24.1 of the Third Revised Ration Order No. 3. In order to be a ration check, such check must be drawn by a depositor against his account and the evidence in this case discloses that Paul J. Ziegler was not a depositor.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Denied] [43]

Defendants' Requested Instruction No. 27

If you determine from all of the evidence that the name of West Coast Supply Company was placed upon any of the checks set forth in counts 1, 3, 5 and 7 after said checks were delivered, then said check or checks were not issued as required by paragraph 15 of Sec. 24.1 of Third Revised Ration Order No. 3, which defines "issue" to mean the delivery of a completed check.

Furthermore, paragraph (f) of Sec. 15.7, Third Revised Ration Order No. 3, requires a person who holds a check which has been altered shall return it to the issuer with the request for a new check. Thus, if you find that the name West Coast Supply Company was placed upon the checks after delivery of said checks, then it

was the duty of the broker or seller to return said checks to the issuer.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Not] [44]

Defendants' Requested Instruction No. 28

You should not be influenced in reaching your verdict in this case solely by reason of the amount of sugar involved, for you must, in order to convict a defendant of any count of the Information, find that each and every material allegation thereof has been proved beyond a reasonable doubt.

Given: J. F. T. O'C., J.

Refused:.....

Given as Modified:.....

[OK] [45]

Defendants' Requested Instruction No. 29

You are instructed that, if you find from the evidence that at the time any or all of the sugar ration checks alleged in counts 1, 3, 5 and 7 of the Information were issued, there were sufficient ration credits available in any or all of the accounts of the West Coast Supply Company in the Union Bank & Trust Company to cover said sugar ration check or checks, then you must find that said check or checks were validly issued and

Paul J. Ziegler

acquit the defendants on the counts relating to said checks.

Given:.....

Refused:.....

Given as Modified: J. F. T. O'C., J.

[OK] [46]

Defendants' Requested Instruction No. 30

You are instructed that in determining whether or not there was criminal intent on the part of Paul J. Ziegler, which is an essential element in the offenses here charged, you should consider whether or not he honestly and in good faith sought the advice of his attorney upon discovering the existence of Executive Order 9745, and if you believe that the defendant, Paul J. Ziegler, after laying all the facts before his attorney in good faith, did the acts of which he is accused, relying upon that advice and believing it to be correct and believing he had a right to do said acts, you cannot convict Paul J. Ziegler of the offenses with which he is charged, which offenses involve wilful and unlawful intent, even if such advice were an inaccurate construction of the law.

Williamson v. United States, 28 S.Ct. 163, 173.

Miller v. United States, C.C.A. 4, 277 F. 721.

Given:.....

Refused: In substance. See my instruction given. J. F. T. O'C., J.

Given as Modified:.....

[Out Pass] [47]

Defendants' Requested Instruction No. 31

No personal feeling or prejudice must be allowed in any manner to influence or direct you in connection with any issue in this Information. It is of no consequence whether you may or may not approve of the appearance, conduct or general bearing of the defendant. If, in your opinion, having heard all the testimony, you are not able to say that after a full and fair comparison of the evidence that you believe that the defendant is guilty to a moral

certainty and beyond a reasonable doubt, you are instructed and directed to return a verdict of not guilty.

Given:.....

Refused:.....

Given as Modified:.....

[Given. J. F. T. O'C., J.] [48]

Defendants' Requested Instruction No. 32

Where, as here, a specific intent is a part of an offense, before a principal may be convicted by reason of the acts of an agent, it must be shown beyond a reasonable doubt, first, that the agent was acting for and on behalf of the principal and not in his individual capacity, and, second, that the principal knowingly and intentionally commanded, aided, advised or encouraged the act committed by the agent or assented to it.

Paschen v. United States, 1934, C.C.A. 7, 70 F.(2d) 491, 503.

Nobile v. United States, 1922, C.C.A. 3, 284 F. 253, 255.

United States v. Food and Grocery Bureau of Southern California, 1942, D.C., Calif., 43 F. Supp. 966.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Out. No] [49]

Defendants' Requested Instruction No. 33

In determining whether or not there was wilful or criminal intent on the part of the defendant, which is an essential element of the offense charged and which

must be proved beyond a reasonable doubt, you should consider whether or not he, in good faith, sought the advice of his attorney respecting the status of sugar rationing by the O.P.A. as a result of the termination of the Emergency Price Control Act on June 30, 1946, and if the defendant, after laying all the facts before his attorney, in good faith did the acts of which he is accused relying upon that advice believing it to be correct and believing that sugar rationing was no longer in effect, then the advice and the good faith of the defendant is a defense to be considered by the jury even if such advice were an inaccurate interpretation of the law.

Generally speaking, advice of counsel is not an excuse for a violation of law, but where the question, as in this case, is one of intent, the advice of counsel and the good faith of the defendant is a defense to be considered by the jury.

Williamson v. United States, 28 S.Ct. 163, 173.

Miller v. United States, C.C.A. 4, 277 F. 721.

Given:.....

Refused:.....

Given as Modified:.....

[Out. See instruction given. J. F. T. O'C., J.] [50]

Defendants' Requested Instruction No. 34

Paragraph 15 of Sec. 24.1 of Third Revised Ration Order No. 3 provides:

“ ‘Issue’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.”

Paragraph 8 of the same section provides:

“ ‘Delivery’ means the transfer of physical possession * * *.”

In order to find that the defendant, Paul J. Ziegler, issued the checks as charged under each count of the Information, the evidence must convince you beyond a reasonable doubt that said checks were completed when they were delivered to the person to whose account they were made payable.

Third Revised Ration Order No. 3, Sec. 24.1
(c)(15).

Third Revised Ration Order No. 3, Sec. 24.1
(c)(8).

Given:

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Refused] [51]

Defendants' Requested Instruction No. 35

Paragraph (f), Sec. 15.7 of Third Revised Ration Order No. 3 provides that no check which has been altered may be issued, transferred or deposited, and that a person who holds such a check shall return it to the issuer. Although the defendant, Paul J. Ziegler, may have signed his name to the various alleged sugar ration checks set forth in the Information, in order for you to find that he issued the checks within the meaning of Third Revised Ration Order No. 3, the evidence must convince you that the checks were not altered by anyone after delivery of the checks by Paul J. Ziegler.

Third Revised Ration Order No. 3, Sec. 15.7 (f).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Not G.] [52]

Defendants' Requested Instruction No. 36

Sec. 24.1 (c)(5) of Third Revised Ration Order No. 3 provides:

“ ‘Check’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.”

Paragraph 9 of the same section provides:

“ ‘Depositor’ means a person who has a ration bank account. * * * ”

It is a material part of the charge in counts 1, 3, 5 and 7 that defendant, Paul J. Ziegler, issued a sugar ration check, or checks. In order for the Government to sustain the proof respecting this material ingredient, it is necessary that the checks referred to in each count not only be signed by Paul J. Ziegler, but the proof must show that they were drawn by him as a depositor against his account.

Unless you find beyond a reasonable doubt that he was a depositor and the checks were drawn against his account, you must acquit on those counts.

Third Revised Ration Order No. 3, Sec. 24.1 (c)(5).

Third Revised Ration Order No. 3, Sec. 24.1 (c)(9).

Given:.....

Refused: J. F. T. O’C., J.

Given as Modified:.....

[Not Given. Evidence shwed Paul J. Ziegler had no account. J. F. T. O’C., J.] [53]

Defendants' Requested Instruction No. 37

On June 29, 1946, the President of the United States vetoed the bill passed by Congress which would have extended the Emergency Price Control Act of 1942, and on June 30, 1946, that Act terminated and was no longer law. On June 30, 1946, all powers derived by the Office of Price Administration from the Emergency Price Control Act of 1942 terminated. On June 30, 1946, President Truman promulgated and signed Executive Order No. 9745 which provided that the Office of Price Administration was directed to continue to exercise all powers and functions which did not terminate by reason of the termination of the Emergency Price Control Act and such powers that were delegated to the O.P.A. pursuant to the Second War Powers Act.

While this Executive Order was signed by the President on June 30, 1946, it was not filed with the Division of Federal Register, Washington, D. C., as required by statute, until July 1, 1946 at 10:32 a.m., and was not published in the Federal Register until July 2, 1946.

Title 50, U.S.C.A., Sec. 966.

92nd Congressional Record 8092.

11 F.R. 7327.

79th Congress, Second Session, Chapter 671, Public Law 548.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Refused. Sub. for old 19.] [54]

Defendants' Requested Instruction No. 38

Under the Federal Register Act, an Executive Order promulgated by the President of the United States is not valid as against any person who has not had actual knowledge thereof until the order is filed with the Division of the Federal Register in Washington, D. C. Upon filing and publication in the Federal Register, such publication creates a rebuttable presumption of notice to persons subject thereto or affected thereby.

The defendant, Paul J. Ziegler, has offered evidence in this case to rebut the presumption that he had notice or knowledge of the contents of Executive Order No. 9745. It is, therefore, for the jury to determine whether or not defendant has rebutted this presumption.

Title 44, U.S.C.A., Sec. 307.

Flannagan v. United States, 1944, C.C.A. 9, 145
F.(2d) 740.

Kempe v. United States, 1945, C.C.A. 8, 151
F.(2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[No] [55]

Defendants' Requested Instruction No. 39

One of the specific ingredients of the offense charged in each and every count of the Information is that of wilful intent to do the acts charged. While under the Federal Register Act the filing of an Executive Order creates a rebuttable presumption of notice to the defendant, the defendant may rebut the presumption that he had actual knowledge of the Executive Order.

If you find that the acts and things of which defendant is accused of doing were done by him, and you further find that, at the time said acts and things were done by the defendant, he did not have knowledge that Executive Order 9745 had been signed by the President, and he did not know that sugar rationing had been continued beyond June 30, 1946, then you should find that the presumption of notice of said Executive Order 9745 to defendant has been rebutted.

Title 44, U.S.C.A., Sec. 307.

Flannagan v. United States, 1944, C.C.A. 9, 145 F.(2d) 740.

Kempe v. United States, 1945, C.C.A. 8, 151 F. (2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....

[Not Given] [56]

Defendants' Requested Instruction No. 40

You are instructed that the evidence adduced at the trial was insufficient to prove that defendant, Paul J. Ziegler, was, at any of the times mentioned in any or all counts of the Information, a partner of West Coast Supply Company. You will accordingly find, therefore, that Paul J. Ziegler was not, at any of the times mentioned in the Information, a partner of said West Coast Supply Company.

Given: J. F. T. O'C., J.

Refused:

Given as Modified:

[G] [57]

I instruct you that if the defendant, Paul J. Ziegler, honestly and in good faith sought the advice of a lawyer as to what he might lawfully do in the matter involved in this action and fully and honestly laid all of the facts before his counsel, and in good faith and honestly followed that advice, relying upon it and believing it to be correct, had only intended that his acts should be lawful, he could not be found guilty of this offense which involves willful and unlawful intent, even if such advice were an inaccurate construction of the law. But, on the

wilfully

other hand, no man can lawfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

(Williamson v. United States, 207 U. S. 453.) [58]

Application of law - - - Depends Upon Facts

The Court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their application depends upon the light in which you view the evidence.

The fact that the court has given you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable to the cause on trial, or as indicating that the court considers them necessarily applicable. Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.

If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instruction into consideration in your deliberation.

People v. Spriac, 262 Pac. 795, 799 (Cal)

[Given J. F. T. O'C., Judge.]

[Endorsed]: Filed Feb. 13, 1947. [59]

[Title of District Court and Cause.]

VERDICT OF THE JURY.

We, the jury in the above entitled case, find the defendant Paul J. Ziegler,

Guilty as charged in the first count of the Information;

Guilty as charged in the second count of the Information;

Guilty as charged in the third count of the Information;

Guilty as charged in the fourth count of the Information;

Guilty as charged in the fifth count of the Information;

Guilty as charged in the sixth count of the Information;

Guilty as charged in the seventh count of the Information; and

Guilty as charged in the eighth count of the Information.

Dated: Los Angeles, Calif., February 11, 1947.

IVAN W. NEWPORT

Foreman of the Jury

[Endorsed]: Filed Feb. 11, 1947. [62]

[Title of District Court and Cause.]

NOTICE OF RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29, RULES OF CRIMINAL PROCEDURE.

To Plaintiff, United States of America; and to James M. Carter, United States Attorney for the Southern District of California, and to Howard V. Calverly and William Strong, Assistant United States Attorneys for Said District, 600 Federal Building, Los Angeles, California, Attorneys for Plaintiff:

Please Take Notice that the defendant in this cause, Paul J. Ziegler, will, in the United States District Court for the Southern District of California, Central Division, on February 18, 1947, at 10:00 a. m., or as soon thereafter as the Motion can be heard in the court room of the Hon. J. F. T. O'Connor, renew his Motion for Judgment of Acquittal under Rule 29, Rules of Criminal Procedure.

CHARLES H. CARR

Attorney for Defendant, Paul J. Ziegler [66]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29 OF RULES OF CRIMINAL PROCEDURE

Defendant, Paul J. Ziegler, renews his Motion for Judgment of Acquittal to each and every count of the Information.

CHARLES H. CARR

Attorney for Defendant, Paul J. Ziegler [67]

Received copy of within Notice of Motion, Motion, and Points and Authorities this 17th day of February, 1947. James M. Carter, Attorney for Plaintiff, by Bonkus.

[Endorsed]: Filed Feb. 17, 1947. [68]

[Minutes: Tuesday, February 18, 1947.]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for hearing on motion of Paul J. Zeigler, defendant, filed February 17, 1947, in arrest of judgment; hearing on renewal of motion for judgment of acquittal under Rule 29, or in the alternative for a new trial; Wm. Ritzi, Esq., Asst. U. S. Attorney, appearing for the Government; Charles H. Carr, Esq., and Mildred Kluckhohn appearing for the defendant; the defendant Zeigler being present:

Attorney Carr argues; Attorney Ritzi argues; the Court makes a statement and orders all motions denied and exception noted.

Attorney Ritzi makes a statement. The defendant Zeigler makes a statement. Attorney Carr makes a further statement.

The Court pronounces judgment against the defendant as follows:

* * * * * [69]

District Court of the United States
Southern District of California, Central Division
No. 19106

Criminal information in eight counts for violation of
U. S. C., Title 50 App. Sec. 633 et seq. 2nd War
Powers Act of 1942, etc.

UNITED STATES

v.

PAUL J. ZIEGLER

JUDGMENT AND COMMITMENT IN EVENT
PROBATION IS VIOLATED

On this 18th day of February, 1947, came the United States Attorney, and the defendant Paul J. Ziegler appearing in proper person, and with his attorney Charles H. Carr and Mildred Kluckhohn, and,

The defendant having been convicted on verdict of jury of the offense charged in the Information in the above-entitled cause, to wit: violation of Title 50, App. 633, et seq., 2nd War Powers Act of 1942, General Ration Order No. 8, 3d Revised ration order No. 3, all as set forth in the eight counts of the Information, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of three months in an institution of the County Jail type on each of the

eight (8) counts of the Information, sentences on all counts to begin and to run concurrently; and it is further ordered by the court that the execution of the jail sentences be suspended and that defendant be placed on probation for sixty (60) days on each of said counts, the terms of probation to begin and to run concurrently, on condition that said defendant shall not violate any law of the United States or of the State of California during that time. Defendant is also fined the sum of Two thousand five hundred dollars (\$2500.00) on each of the eight (8) counts of the Information, making a total fine of twenty thousand dollars (\$20,000.00).

It Is Further Ordered that if the defendant desires to appeal, the condition of appeal will be that one half of the said fines imposed upon defendant shall be deposited in the registry of the court, and no further order will be required of the defendant.

Defendant is allowed a stay of execution on the fines to 2/28/47, noon.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein. In the event defendant violates the terms of probation.

(Signed) J. F. T. O'CONNOR
United States District Judge.

A True Copy. Certified this 18th day of February, 1947.

(Signed) EDMUND L. SMITH
Clerk.

(By) Francis E. Cross
Deputy Clerk. [70]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Paul J. Ziegeler, 1654 Long Beach Avenue, Los Angeles, California.

Name and Address of Appellant's Attorney:

Charles H. Carr, 675 Subway Terminal Building, 417 South Hill Street, Los Angeles, California.

Offense:

Title 50 U. S. Code App. Sec. 633, et seq. Second War Powers Act of 1942; General Ration Order No. 8, Sec. 2.9; and Third Revised Ration Order No. 3, Sec. 15.7(d).

Concise Statement of Judgment or Order Giving Date and Any Sentence: [78]

Defendant, having been found guilty on eight counts of the Information, the Court on February 18, 1947, pronounced judgment as follows:

The Court ordered Defendant committed to the custody of the Attorney General for imprisonment for a period of three months in an institution of the County Jail type on each of the eight counts of the Information, sentences on all counts to begin and to run concurrently; it was further ordered by the Court that the execution of the jail sentences be suspended and Defendant be placed on probation for a period of sixty days on each of said counts, the terms of probation to begin and to run concurrently, on condition that said Defendant shall not violate any law of the United States or of the State of California during that time.

The Court also fined Defendant the sum of \$2,500.00 on each of the eight counts of the Information, making a total fine of \$20,000.00.

It was further ordered that in the event Defendant desires to appeal, the condition of appeal will be that one-half of the said fines imposed upon Defendant shall be deposited in the Registry of the Court, and no further order will be required of the Defendant.

The above Judgment was entered February 18, 1947.

The above named appellant, Paul J. Ziegler, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the above Judgment.

Dated this 25th day of February, 1947.

CHARLES H. CARR

Attorney for Appellant

[Endorsed]: Filed Feb. 25, 1947. [74]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF ORIGINAL EXHIBITS TO NINTH CIRCUIT COURT OF APPEALS

It is hereby stipulated by and between Counsel for Defendant, Paul J. Ziegler, and Counsel for Plaintiff, United States of America, subject to order of the Court and pursuant to Rule 75(i), Federal Rules of Civil Procedure, that all of the original exhibits in the above entitled case may be withdrawn from the files of this Court and forwarded by the Clerk of the United States Dis-

trict Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for inspection by the Appellate Court and in lieu of copies thereof, and that said original exhibits may be returned to the Clerk of the United States [75] District Court after they have served their purpose.

June 2, 1947.

CHARLES H. CARR

Attorney for Defendant

WILLIAM STRONG

Attorney for Plaintiff

[Endorsed]: Filed Jun. 4, 1947. [76]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EX-
HIBITS TO NINTH CIRCUIT COURT OF
APPEALS

Defendant, Paul J. Ziegler, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment herein entered February 18, 1947; and

The said Defendant and Plaintiff having, through their attorneys, by stipulation agreed that all original exhibits in the within action may be transmitted to the Circuit Court of Appeals for the Ninth Circuit; and

The Court having, under Rule 75(i), Federal Rules of Civil Procedure, deemed it necessary and appropriate that

all original exhibits in the within action be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and that the originals be inspected by said Appellate Court;

It Is Hereby Ordered, Adjudged and Decreed that all original exhibits in the within action shall be withdrawn from [77] the files of this Court and transmitted by the Clerk thereof to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit so that said original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, and the originals inspected by said Appellate Court; and

It Is Further Ordered, Adjudged and Decreed that after said original exhibits have served their purpose in said Appellate Court, they be returned by the Clerk of the Circuit Court of Appeals for the Ninth Circuit to the Clerk of the United States District Court for the Southern District of California.

June 4, '47.

J. F. T. O'CONNOR
Judge U. S. District Court

Presented by Charles H. Carr, Atty. for Defendant,
Paul J. Ziegler.

Approved as to Form William Strong, Attorney for
Plaintiff.

[Endorsed]: Filed Jun. 4, 1947. [78]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME
FOR FILING AND DOCKETING

It Is Hereby Stipulated by and between the parties hereto through their respective Counsel that Defendant and Appellant may have to and including June 1, 1947, within which to file and docket the Record on Appeal in the above entitled matter, subject to Order of Court.

Dated this 17th day of March, 1947.

CHARLES H. CARR

Attorney for Defendant and Appellant, Paul J. Ziegler

WILLIAM STRONG

Asst. U. S. Attorney, Attorney for Plaintiff and Appellee, United States of America

It is so ordered

BEN HARRISON

Judge, U. S. District Court

[Endorsed]: Filed Mar. 17, 1947. [79]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME
FOR FILING AND DOCKETING

It Is Hereby Stipulated, by and between the parties hereto, through their respective Counsel, that Defendant and Appellant may have to and including the 20th day

of June, 1947, within which to file and docket the Record on Appeal in the above entitled matter, subject to Order of Court.

Dated: May 28, 1947.

CHARLES H. CARR

Attorney for Defendant and Appellant, Paul J. Ziegler

JAMES M. CARTER

U. S. Attorney

Attorney for Plaintiff and Appellee, United States of America

It Is so Ordered,

J. F. T. O'CONNOR

Judge, U. S. District Court

[Endorsed]: Filed May 28, 1947. [80]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive contain full, true and correct copies of Information; Minute Order Entered January 13, 1947; Motion to Dismiss the Information; Minute Order Entered January 20, 1947; Notice of Motion to Amend; a portion of the Minute Orders Entered February 4 and February 7, 1947; Defendant's Requested Instructions;

Minute Order Entered February 11, 1947; Verdict of the Jury; Notice of and Motion in Arrest of Judgment; Notice of and Motion for Judgment of Acquittal under Rule 29 etc.; Minute Order Entered February 18, 1947; Judgment and Commitment; Order for Deposit of Bonds Pending Appeal; Notice of Appeal; Stipulation and Order for Transmittal of Original Exhibits; Two Stipulations and Orders Extending Time for Filing and Docketing Appeal and Stipulation Designating Record on Appeal which, together with the Original Exhibits and Copy of the Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$21.30 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,
Tuesday, February 4, 1947.

Appearances:

For the Plaintiff: Wm. Strong, Esq.

For the Defendants: Charles H. Carr, Esq., and Mildred Kluckhorn.

Los Angeles, California, Tuesday, February 4, 1947,
10:00 A. M.

The Court: Call the calendar, Mr. Cross.

The Clerk: No. 19,106 Criminal, United States against West Coast Supply Company, a partnership, and Paul J. Ziegler, for a jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: The defendants are ready.

The Court: Call the jury.

(Whereupon, a jury was duly selected, empanelled and sworn.)

The Court: Does either side feel we should have an alternate juror in this case?

Mr. Strong: I don't see any necessity for it, your Honor.

The Court: Mr. Carr?

Mr. Carr: I don't think so, your Honor.

The Court: The jurors who have not been called to service in this case will be excused until Thursday of this week. That will be February the 6th at 9:45 in Judge McCormick's court, which is the court room just opposite

this one. You will report there, please. You will now be excused.

We have had no recess this morning; and if we take our usual recess, it would bring us to 12:00 o'clock. So I [3*] think it would be agreeable to the Government and the defense to adjourn now until 2:00 o'clock.

Is that satisfactory?

Mr. Carr: Yes, your Honor.

Mr. Strong: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, during all the recesses of this case you will not discuss this case or any part of it with any of your fellow jurors or with anyone else. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 2:00 o'clock.

(Whereupon, at 11:40 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [4]

Los Angeles, California, Tuesday, February 4, 1947;
2:00 P. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. 19,106 Criminal, United States against West Coast Supply Company and Paul J. Ziegler for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defendants.

The Court: Do both parties stipulate the jury is present?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Does the Government wish to make an opening statement?

Mr. Strong: Yes, your Honor.

The Court: Does either side require the court to again read the information to the jury? I have read the information in full, the eight counts, to the jury. They have all said that they heard it.

After the jury is sworn it is proper to read it again if either side desires it read to the jury.

Mr. Carr: The defense waives that, your Honor, gladly.

Mr. Strong: The Government waives.

The Court: Does the Government wish to make an opening statement?

Mr. Strong: Yes, your Honor. [5]

The Court: Proceed.

Opening Statement in Behalf of the Government.

Mr. Strong: Your Honor, counsel, ladies and gentlemen, I am not going to spend too much time discussing with you here now what it is that the Government intends to prove in this case because I think that as the proof goes in you will be able to discern yourself very clearly exactly how it fits into the picture.

I merely want, however, to put before you what it is that the Government intends to prove, in general terms, so that you will have some outline for following the proof as it comes through the witnesses and the exhibits which I introduced in evidence.

You heard the information read by His Honor, and you will recall there are eight counts here, each one charging a separate violation.

Four of these counts relate to the issuance of ration checks by the defendants. That is what the Government charges; and, of course, as you know, that is what we

hope to prove, hope to convince you that happened. But at this point it is simply what we charge happened, what we intend to show you did happen.

You have four of these counts dealing with ration checks which were issued, as we claim, at a time when the [6] account on which they were drawn did not have anywhere near the amount of pounds of sugar available for drawing by means of ration checks that the checks covered.

Specifically we intend to show you that the total of the four checks which were issued by these defendants were one million three hundred thousand pounds of sugar and that the defendants knew at the time that they issued these checks, all of which were issued on one day—July 1st, 1946—that there was not any one million three hundred thousand pounds available to them to draw. As a matter of fact, the total amount available to draw on was less than 50,000 pounds.

One of the witnesses will give you the exact figures, but it is less than fifty thousand pounds. So that there was, as we believe, a considerable overdraft on that date.

We will further attempt to show you that the defendants knew full well at the time that they issued these checks for one million three hundred thousand pounds that they could not draw any such amount because there was not that much available; and they also knew it was necessary, in order to obtain sugar, to have ration checks issued for the amount of sugar which they obtained.

That deals with four counts. Each one covers one check, the total of which, as I say, is one million three hundred thousand pounds. The other four counts deal with the receipt of sugar which the Government charges was a rationed [7] commodity at that time.

These counts charge that certain amounts of sugar were received by the defendants on the basis of and in exchange for these ration checks that I just mentioned and that when they obtained this sugar, which totaled approximately one million three hundred thousand pounds, less two hundred twenty thousand, whatever it is—it is one million one hundred thousand pounds, in that vicinity—that when they received that sugar they knew that they had not given any ration currency for which they had a sufficient balance in the account and that they knew that they were, in fact, receiving sugar without having the ration currency.

That, as His Honor will tell you in the instructions on the law, is, as the Government charges, a violation of the law.

The evidence which I will produce here, in brief outline, will be first to show the issuance of these checks, to show who issued them, to show you the checks themselves.

We will introduce them in evidence, if His Honor permits. Then we will try to show you how it was followed through, step by step; how the sugar was ordered; how it was delivered; how they received it. So you will be able to see the precise formula that was followed and exactly how the entire transaction was carried out.

The documentary evidence which I intend to introduce [8] will be all along those lines. Then, as you can see, as I said at the outset, all that I am giving you is just a general outline because there is no point of my going into each of the items of evidence when everything that I introduce will be intended to point in that general direction:

Four checks totaling one million three hundred thousand pounds, issued when there was no such balance, and sugar received in return for those checks which, in effect, was received without the ration currency being issued because the ration currency, we claim, was not any good since there was no balance to cover it.

The Court: Does the defense wish at this time to make an opening statement, or at the conclusion of the Government's case?

Mr. Carr: We would like to waive a statement at this time, your Honor.

The Court: Let the record show the defense reserves an opening statement to the jury until the close of the Government's case.

Gentlemen, when may I have the requested instructions?

Mr. Strong: This afternoon.

The Court: Mr. Carr?

Mr. Carr: Your Honor, I have most of my general instructions ready. I am working on the specific instructions. Frankly, until I can see the direction of the proof, maybe [9] it will be this afternoon. I will probably be in a position tomorrow to present them, but I should like to have the advantage of at least getting the direction of the proof.

It will be under the new rules, I believe, that it was contemplated that the defendant be given that opportunity.

I shall not delay, your Honor.

The Court: All right, tomorrow afternoon at 2:00 o'clock.

The Government may proceed.

Mr. Strong: Call Richard Hartt.

Mr. Carr: I hate or dislike removing all these people from the court room; but I really ought to request the rule, your Honor. If counsel has some category of witnesses he might wish not to exclude from the court room, I shall be perfectly willing to try to be reasonable about it. Otherwise I shall have to request that the witnesses be excluded.

The Court: How many witnesses have you, Mr. Strong?

Mr. Strong: Approximately 40. About seven or eight are Office of Price Administration agents.

The Court: That is a group such as Mr. Carr mentions.

Mr. Carr: I realize that one or two agents working on the case may remain. We are certainly not going to object to that. If they are going to testify to some similar transaction which is a corroborative matter, I would prefer that one testify out of the presence of the other.

Mr. Strong: We have no objection. [10]

The Court: I shall exclude witnesses on both sides, except the defendant, of course.

Mr. Strong: We would like to have two agents to work on the case.

The Court: There is never any objection to that.

Mr. Carr: I have no objection to that.

The Court: Will you see what court room is available (addressing the bailiff)?

Mr. Carr: We have none here at present for the defense, except the defendant, your Honor.

The Court: All right.

(Brief pause in the proceedings.)

The Court: You may call your first witness. We can get the preliminaries over.

Mr. Strong: Mr. Hartt.

The Court: There is no objection to that?

Mr. Carr: No, no objection.

RICHARD C. HARTT,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Richard C. Hartt.

The Clerk: Take the stand, please.

The Court: H-a-r-t? [11]

The Witness: H-a-r-t-t.

The Court: Proceed.

Mr. Carr: Go ahead, I have no objection if he goes ahead at this time while we are waiting for the witnesses to leave.

Mr. Strong: Your Honor, may I remain seated while I examine the witness?

The Court: Yes.

Mr. Strong: Thank you.

Direct Examination.

By Mr. Strong:

Q. Mr. Hartt, what is your occupation?

A. Banking.

Q. What bank? A. Union Bank.

Q. What is your capacity there?

A. At present I am manager of the adjustment department.

(Testimony of Richard C. Hartt)

Q. Did you at any time while you were employed by the Union Bank—I assume that is the Union Bank and Trust Company? A. That is right.

Q. Los Angeles? A. Yes.

Q. Eighth and Hill Streets? [12] A. Yes, sir.

Q. Did you at any time while you were employed by that bank during 1946 have any duties with reference to sugar ration accounts with that bank?

A. I had complete charge.

Q. Beg pardon? A. I had complete charge.

Q. Did you at any time during 1946 have charge of the ration bank account of the West Coast Supply Company? A. Yes, sir.

The Court: All witnesses in the case will be excluded from the court room. You will be called as counsel for either side desires your presence. If you will please go with the bailiff now, he will show you to the court room that is available.

(Witnesses excluded from the court room.)

Mr. Carr: May I suggest that counsel state for the record the names of the agents that he is having remain?

Mr. Strong: Yes. Mr. Findley and Mr. Pruitt.

Mr. Carr: Thank you.

The Court: Which is Mr. Findley?

Mr. Strong: Mr. Findley?

(Mr. Findley rises.)

The Court: Thank you. And Mr. Pruitt?

(Mr. Pruitt rises.) [13]

The Court: Thank you. Mr. Pruitt.

We have 12 left in the audience. Are any of those witnesses, Mr. Strong or Mr. Carr?

(Testimony of Richard C. Hartt)

Mr. Carr: Not defense witnesses, your Honor.

Mr. Strong: I don't know some of my witnesses by sight. May I make inquiry direct?

The Court: I shall ask them.

Is anyone in the court room, or any of you, witnesses on either side of this case?

(No response.)

None seem to be witnesses. Proceed, Mr. Strong.

Mr. Strong: May I have the last question?

(Question read by the reporter.)

Q. By Mr. Strong: That is at the Union Bank and Trust Company? A. Yes, sir.

Q. Now, will you explain what kind of an account that is and how it operates?

A. Do you want the complete explanation of how a ration bank account operates?

Q. In as few words as you possibly can.

A. Well, a ration bank account is nothing more or less than a dollar account in a certain sense, that if a man were to draw a check against a ration sugar account he should have so many pounds of sugar to cover the checks that he draws. [14]

Q. Let me ask some questions. It might speed this up.

Mr. Carr: I move that that portion of the answer that "he should have so many" be stricken.

Mr. Strong: I will agree to that.

The Court: Yes, strike out "should have."

Q. By Mr. Strong: Is it an account in which there are deposits made? A. Yes, sir.

Q. Deposits of what made?

(Testimony of Richard C. Hartt)

A. They consist of ration checks, sugar ration checks or stamps.

Q. Is that by numbers of points or pounds?

A. By pounds.

Q. By pounds. Did you have, in effect, deposits or credits of so many pounds available?

A. That is correct.

Q. Those deposits are made by means of deposit slips?

A. Yes, sir.

Q. Are they accompanied by anything?

A. The deposit slips were accompanied by either stamps pasted on little cardboards or checks.

Q. Checks issued by whom?

A. Checks issued by various people.

Q. On their own sugar accounts?

A. On their own sugar accounts. [15]

Q. And you keep a regular set of books on these accounts? A. Yes.

Q. Have you brought with you any books with reference to the sugar ration account of the West Coast Supply Company?

A. I have got with me three ledger sheets pertaining to that account.

Q. May I see them, please?

A. (Producing documents.)

Mr. Strong: Your Honor, may I have these marked for identification as one exhibit, stapled together?

The Court: They may be so marked.

The Clerk: Government's Exhibit No. 1 for identification.

(The documents referred to were marked Government's Exhibit No. 1 for identification.)

(Testimony of Richard C. Hartt)

Q. By Mr. Strong: I show these three sheets, which have been marked as Government's Exhibit 1 for identification, and will you please explain what these are?

A. This is a statement sheet showing the balance of the number of pounds of sugar on deposit at specified dates.

Q. For whom?

A. For the West Coast Supply Company.

Q. Where?

A. At the Union Bank and Trust Company in Los Angeles at Eighth and Hill. [16]

Q. Is that all one account?

A. There are three separate accounts here.

Q. Will you state what they are?

A. They have a wholesale account, a processing account and an industrial account.

Q. Are these sheets so marked? A. Yes, sir.

Q. And is this the record on which the bank keeps track of the deposits and withdrawals in connection with the West Coast Supply Company account on sugar rationing? A. Yes, sir.

Q. Have you made a search of your records to determine whether there are any such other ledger sheets for the West Coast Supply Company?

A. In regards to sugar rationing?

Q. Yes.

A. We have, but they are all of different periods.

Q. Yes?

A. Those are the only accounts for that period.

(Testimony of Richard C. Hartt)

Mr. Strong: I offer this in evidence, your Honor.

The Court: In evidence.

Mr. Carr: If the court please—

The Court: Go ahead.

Mr. Carr: I should like to make this general objection: that he is offering the ledger sheets on three accounts, and [17] we have no identification of what proof he is going to offer as to which account, which account is involved in this information. And upon that general ground I must object because he is actually introducing three separate accounts now.

Mr. Strong: May I state—

Mr. Carr: I don't know just what the purpose is.

Mr. Strong: —it is the Government's intention that all accounts were insufficient to cover the checks drawn. Consequently, we are introducing all the ledger sheets for all the accounts.

The Court: Under that theory it may go in if you can establish it. Otherwise it will be subject to be stricken out by defense counsel if you do not connect it up.

Mr. Carr: I think with that understanding it is perfectly all right.

The Court: You may strike it out if it is not connected up.

The Clerk: Government's Exhibit 1 in evidence.

(The documents referred to were marked Government's Exhibit 1 and introduced in evidence.)

Q. By Mr. Strong: Did you at my request make a search of all the sugar rationing accounts of the Union

(Testimony of Richard C. Hartt)

Bank and Trust Company to determine whether during June, July or August, 1946, there was any sugar rationing account of any kind for the John H. Ziegler Company? [18] A. There were not.

Q. You made a search? A. Yes, sir.

Q. There was no such account?

Mr. Carr: That is objected to as being wholly without the issues of this case, your Honor. I see no connection with any change in the indictment, the information, rather.

The Court: Well, he is not mentioned.

Mr. Strong: He is the first witness, your Honor. I cannot prove anything in the case through the first one. However, I can withdraw that question at this time.

The Court: This is Paul J. Ziegler.

Mr. Strong: Yes.

The Court: I shall sustain that objection.

Mr. Strong: All right.

Q. Is there an authorized signature card used by the Union Bank and Trust Company in connection with the sugar ration accounts? A. Yes, sir.

Mr. Strong: May I have this marked as Government's Exhibit next in number?

The Clerk: Government Exhibit 2 for identification.

(The document referred to was marked Government's Exhibit No. 2 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 2 [19] for identification. Will you state what this document is?

A. This document is a signature card for the ration bank account of the West Coast Supply Company for processed food, sugar, meats, fats, and so forth.

(Testimony of Richard C. Hartt)

It shows all of those people authorized to sign on checks drawn against this account.

Q. That is the West Coast Sugar—

A. West Coast Supply.

Q. Supply Company? A. Yes.

Mr. Strong: I offer this in evidence as Government's Exhibit 2, your Honor.

The Court: In evidence?

Mr. Carr: I will have to object.

The Court: Just a moment.

Mr. Carr: I don't know about the connecting up, your Honor; but just to keep my record straight, with the same understanding, subject to motion to strike?

The Court: With the same understanding, it is in evidence subject to a motion to strike if not connected up.

Mr. Strong: If your Honor please, I am a little confused. I do not know what your Honor means by "the same understanding."

This is a general signature card. I don't know that the same problem arises as it does with those sheets.

The Court: Well, the point is, suppose you do not connect [20] it up with any of these signatures? Would not a motion to strike be good?

Mr. Strong: Oh, yes. I am sorry. I misunderstood the understanding.

The Court: Certainly.

Q. By Mr. Strong: I show you Government's Exhibit 2 and ask you whether any sugar ration checks were drawn against this account signed by the one whose signature is shown here, "Paul J. Ziegler"?

(Testimony of Richard C. Hartt)

Mr. Carr: Well, now, the checks, I am afraid, must speak for themselves. I object to that as calling for a conclusion of the witness.

The Court: There is no foundation laid. The objection would be good there.

You would have to show that this witness knows the signature of Paul J. Ziegler.

I think that objection would be good, counsel.

Mr. Strong: May I have these documents marked as Government's Exhibits next in number, each one separately, if your Honor please?

The Clerk: That will be Government's Exhibits 3, 4—

The Court: Now, wait a minute. Government's Exhibit 3. Will you give me the number of the check and the date?

The Clerk: Yes, your Honor. The check is No. 148. It is dated July 1, 1946; and it is for eighty thousand pounds of [21] sugar.

That is Government's Exhibit 3 for identification.

(The document referred to was marked as Government's Exhibit No. 3 for identification.)

The Court: All right, the next one?

The Clerk: The next one is Government's Exhibit No. 4. It is dated July 1, 1946, check No. 146, and for 660,000 pounds of sugar.

(The document referred to was marked as Government's Exhibit No. 4 for identification.)

The Court: The next one?

(Testimony of Richard C. Hartt)

The Clerk: Yes, your Honor. The next one is Government's Exhibit 5 for identification. It is a check dated July 1, 1946, for 30,000 pounds of sugar, check No. 145.

(The document referred to was marked as Government's Exhibit No. 5 for identification.)

The Court: The next one?

The Clerk: The next exhibit is Government's Exhibit 6 for identification. It is a check dated July 1, 1946, No. 144 for 600,000 pounds of sugar.

(The document referred to was marked as Government's Exhibit No. 6 for identification.)

The Court: The West Coast authorization card, Mr. Cross, is Exhibit No. what?

The Clerk: No. 2, your Honor. [22]

The Court: Very well.

Q. By Mr. Strong: I show you Government's Exhibits Nos. 3, 4, 5, and 6; and ask you whether you ever saw these documents before? A. Yes, sir, I have.

Q. Did you see them in your capacity which you have described here in connection with the sugar ration account with the Union Bank and Trust Company?

A. Yes, sir.

Q. And approximately when did you see those documents? A. Sometime in July.

Q. What year? A. Of 1946.

Q. As far as you know, or do you know whether those checks were paid against the account of the West Coast Supply Company at your bank?

A. Yes, sir, they were posted against that account.

(Testimony of Richard C. Hartt)

Q. Does the posting of these four checks which you have before your hand appear on these ledger sheets which are Government's Exhibit 1 in evidence?

A. Yes, sir, they do.

Q. Would you take a pencil and check off where they appear on those sheets? A. (Marking document.)

Mr. Carr: May the record show which account he is [23] referring to?

Q. By Mr. Strong: Have you done that?

A. Yes, sir.

Q. Will you state for the record against which account these checks were marked?

A. These checks were marked against the Wholesale account of the West Coast Supply Company.

Q. At the time that you saw these checks in July, 1946, will you state whether their appearance on the face of the check was the same as they are now; or if it was different, in what respect it was different?

Mr. Carr: That is objected to, your Honor. Counsel is really getting ahead of himself.

He is, in the record, putting the checks in evidence. I have not been able to object to the foundation to several questions. The foundation involves, first, the authority of the West Coast Supply Company for whoever acted on their behalf; secondly, this morning counsel himself said there was some question about the variance on the check. And I think the proper thing is either to offer the checks or not offer them.

He is now attempting to establish in the record what the checks themselves show. I object to his doing it in that manner.

Mr. Strong: If your Honor please— [24]

(Testimony of Richard C. Hartt)

The Court: Well, the question as the court understands it—and if I am not correct, I will stand corrected—is merely asking this witness this one question at this time, whether or not these instruments, Exhibits 3, 4, 5 and 6 for identification, are in any manner changed from the time that he had them or saw them in his possession in July.

That far it seems to the court proper. In other words, if he could show they had been mutilated in any manner or that there was something different, limited to that in this question, if counsel has any objection, I think that is what the court gathers from the question.

Mr. Strong: That was the purpose of my question.

The Court: Limited to that, Mr. Carr—

Mr. Carr: Very well. If he is limited to that specific thing.

The Court: Are they the same as he saw them, or if there is any change, he may indicate it. All right.

The Witness: Yes, sir, they are the same as when I saw them in '46.

Q. By Mr. Strong: You have examined them?

A. Yes, sir.

Q. Now, in connection with these four checks—Government's Exhibits 3, 4, 5 and 6 for identification—did you have any discussion with either of the defendants at or about the date that appears on these checks? [25]

Mr. Carr: Well, now, which defendants are you referring to? One is a partnership.

Mr. Strong: I think if he answers "yes," I can ask him which.

Mr. Carr: I object to that question. It is compounded in such a way that it may catch the defendant by sur-

(Testimony of Richard C. Hartt)

prise. One defendant is a partnership. The other is Paul J. Ziegler.

The Court: Mr. Reporter, will you read the question again?

(Question read by the reporter.)

The Court: Just answer that yes or no. If the witness says "no," then that ends it.

Mr. Carr: That is true.

The Court: Answer that yes or no.

The Witness: Yes.

The Court: Proceed.

Q. By Mr. Strong: Which one?

A. The check of 600,000 pounds of sugar.

Q. Which defendant? A. Mr. Paul J. Ziegler.

Q. What was the occasion of your calling or speaking, rather, to Mr. Paul J. Ziegler in connection with any of these checks?

A. Well, through ordinary banking functions when an account became over drawn we always called up our depositor [26] to inform him of such an overdraft to see whether or not our books or his books might have been in error.

Q. Is that what happened in this case?

A. Yes.

Q. But when did you call Mr. Paul Ziegler the first time with reference to any of these checks?

A. I would say approximately the 25th or 26th of July of 1946.

Q. And in connection with which check did you call him? A. The check of 600,000 pounds of sugar.

Q. Would you look at those checks and see which Exhibit number it is? A. That is Exhibit No. 6.

(Testimony of Richard C. Hartt)

Q. Did you speak to Mr. Ziegler personally directly, over the phone, or in what manner?

A. On the phone.

Q. Would you state the conversation and everything that transpired from the time that you began to put in the call for Paul Ziegler?

Mr. Carr: Well, I would like a little better foundation laid, your Honor. After all, he is talking to someone on the telephone. Counsel certainly ought to lay the foundation.

The Court: I think you ought to first identify further, if he knows, the voice and how many times he talked to him, a little better foundation. [27]

Q. By Mr. Strong: Have you had occasion to speak to the defendant, Paul J. Ziegler, on any occasion prior to this time that you are referring to? A. Yes, sir.

Q. Approximately how many times had you spoken to Paul J. Ziegler? A. Oh, about a half a dozen.

Q. Was that directly to his face or over the phone or both?

A. Well, Mr. Ziegler came up to the bank on one occasion. I spoke to him there, and then I had called him on the other occasions at the West Coast Supply Company.

Q. Was that in connection with any business relating to the sugar rationing account of the West Coast Supply Company? A. Yes, sir.

Q. Were you able to recognize Mr. Ziegler's voice over the telephone on those occasions? A. Yes, sir.

Q. Did he, on any of the occasions prior to the one that I am questioning about here, identify himself over the phone as Paul J. Ziegler?

(Testimony of Richard C. Hartt)

A. Well, my recollection is not Paul J. I would call the West Coast Supply Company and ask for Mr. Paul Ziegler. My recollection is that the voice coming back from the phone [28] said, "Ziegler speaking."

Q. On the occasion when you called the West Coast Supply Company, with reference to this check for 600,000 pounds, did you ask for Mr. Paul Ziegler?

A. Yes, sir.

Q. And did a voice reply? A. Yes, sir.

Q. Will you state what was said?

Mr. Carr: Well, now, just a moment, your Honor. I think that I should be allowed the privilege at this point of voir dire, of establishing that there are two other brothers there.

Mr. Strong: I have no objection.

The Court: Proceed.

Mr. Carr: May I just ask one question?

The Court: Proceed.

Voir Dire Examination.

By Mr. Carr:

Q. Mr. Hartt, you know that there are two other brothers besides Paul Ziegler? A. Yes, sir.

Q. Had you talked to them on the telephone?

A. No, sir.

Q. So far as you know, you had never talked to them? [29]

A. No. The only one, as far as I know of that I ever spoke to on the phone, was Mr. Paul Ziegler.

The Court: Proceed.

(Testimony of Richard C. Hartt)

Direct Examination (Resumed)

Q. By Mr. Strong: On this occasion did you recognize the voice on the other end of the phone?

A. Yes, sir, as the voice I had spoken to before.

Q. Whose voice? A. Mr. Paul Ziegler.

Q. The defendant? A. Yes, sir.

Q. Will you now state the substance of the conversation between you and Mr. Ziegler on that occasion?

A. Well, when the voice came on the phone and said, "Ziegler speaking," I said, "This is Hartt, Union Bank and Trust Company. In regards to your ration banking account I have a check here for 600,000 pounds of sugar, and you don't have near enough sugar in your ration banking account to cover it. Do you have any deposits to come in the bank that will take care of it?"

And the answer was, "Well, this is Saturday morning. There is no one here except myself right now. But I will contact you on Monday."

So I held it in abeyance until Monday; and not having [30] heard from Mr. Ziegler during banking hours on Monday, I immediately called the Office of Price Administration to report an unusual overdraft on the sugar ration account of the West Coast Supply Company.

Mr. Carr: I move to strike the word "unusual," your Honor, as being—

The Court: It may go out. The word "unusual" may go out as a conclusion of the witness.

Q. By Mr. Strong: Go ahead.

A. That is all there was to it at that time. I called them.

The Court: "Them"? Whom do you mean by "them"?

The Witness: The Office of Price Administration.

(Testimony of Richard C. Hartt)

The Court: Do not give us any conversation with them.

The Witness: No

Q. By Mr. Strong: Did you have occasion to speak—
was your Honor going to say something?

The Court: I just warned the witness not to give any
conversation with the Office of Price Administration.
Proceed.

Q. By Mr. Strong: Did you on the Monday follow-
ing this Saturday call have occasion to call the West Coast
Supply Company again? A. No, sir, I did not.

Q. When was the next time that you spoke to Paul
J. Ziegler? [31]

A. Mr. Ziegler called me on Tuesday.

Q. Beg pardon?

A. Mr. Ziegler called me on Tuesday, the following
day.

Q. Did you recognize his voice? A. Yes, sir.

Q. Will you state the substance of the conversation
on that occasion?

Mr. Carr: Do I understand you are referring to Paul
Ziegler still?

Mr. Strong: Yes.

The Witness: Mr. Paul Ziegler called me on Tuesday
and told me he had tried to contact me on Monday but
was unable to locate me, which might have been so
because—

The Court: Just a moment.

The Witness: —because I am at various—

The Court: Just a moment. Just answer the question,
please.

Q. By Mr. Strong: Just state the conversation with-
out any trimmings.

(Testimony of Richard C. Hartt)

A. Thank you. I am sorry.

The Court: It is all right. The average layman is not familiar with court procedure. I want you to know, witness: do not take it as any personal offense when the counsel on either side make a suggestion or make an objection. Proceed.

The Witness: Mr. Ziegler said that he had tried to [32] contact me on Monday. I told Mr. Ziegler, not having heard from him, I had reported this overdraft to the Office of Price Administration.

The only reply I got from Mr. Ziegler was, "Well, okay."

Q. By Mr. Strong: Did you at any time subsequent to that have any occasion to speak to Mr. Paul J. Ziegler about any of the other checks, which are Government's Exhibits 3, 4, 5 and 6 for identification?

A. Yes, sir, I did.

Q. When was that?

A. Oh, I should say approximately the first of August when another one of the checks, which are now offered as Exhibits, came into the bank.

Q. Which is that?

Mr. Carr: Well, now, if the court please, we are continually referring to exhibits which are not in evidence and they are being testified to as facts concerning those exhibits. I am going to object.

The Court: Mr. Carr, if the Government offers them, all of them, at this time, you will say there is no connection with this case and they have not been identified.

I assume the only purpose at this time is to identify sufficiently the checks so that they may be offered in evidence.

(Testimony of Richard C. Hartt)

Mr. Carr: Well, just so that I may make myself plain, your Honor. [33]

The Court: Yes.

Mr. Carr: The thing I am concerned about is establishing in a criminal case the responsibility of someone acting for a partnership; and may I reserve, then, the right to later, if it is not established, move to strike this line of testimony?

The Court: Yes, that will be understood. Proceed. Read the last question.

(Question read by the reporter.)

The Court: Which check?

The Witness: The check of 660,000 pounds of sugar.

The Court: That is No. 4.

Q. By Mr. Strong: Did you call up Mr. Paul J. Ziegler? A. Yes, sir.

Q. Did you recognize the voice on the other end of the telephone?

A. I recognized it as the same voice that I had spoken to before.

Q. Whose voice? A. Mr. Paul J. Ziegler.

Q. Will you state the substance of the conversation on this occasion?

A. At that time I told Mr. Ziegler that another check had arrived in the bank for 660,000 pounds of sugar; and Mr. Ziegler's reply was, "Well, your instructions are to post [34] it and show it as an overdraft and report it to the Office of Price Administration."

I said, "Yes, sir, those are my instructions and that is what I intend to do."

He said, "Okay."

(Testimony of Richard C. Hartt)

Q. Do your records show any place the number of pounds of sugar which were available for draft in the account of the West Coast Supply Company on July 1st and thereafter?

A. Yes, sir, they do.

Q. Which of the records shows that?

A. These ledger sheets.

Q. That is, Government's Exhibit 1?

A. Yes, sir.

Q. Will you indicate where it shows the highest balance available on and after July 1, 1946?

A. In the furthest right-hand column.

Q. Would you underscore that, please?

A. (Marking document.) That is the balance as of that date.

Q. As of what date?

A. As of July the 11th. That is the balance they had on hand when the large—

Q. Speak up louder so the jury and counsel can hear you.

A. Well, I might as well— [35]

Q. Speak up, please.

A. Okay. The balances kept in the right-hand corner of the ledger sheet—they are the balances.

Q. Just tell me what the balance was, the balance as of July 11, 1946, on the sugar ration account of the West Coast Supply Company?

A. The sugar ration account of the West Coast Supply Company was 23,196 pounds.

Q. Was there at any time after July 11, 1946, any amount higher than the 23,196 pounds?

A. No, sir.

(Testimony of Richard C. Hartt)

Q. That is, in the account of the West Coast Supply Company? A. No, sir.

Q. Is that right? A. That is right.

The Court: When was the account closed?

The Witness: The account was closed on the 30th of August, 1946.

Q. By Mr. Strong: Were any deposits made to that account between July 1, 1946 and the date that it was closed? A. No, sir.

Q. You are talking about the wholesale account, is that right? A. Yes, sir. [36]

Q. Would you look on the industrial sugar account and state what was the highest balance of sugar credit available in that account for the West Coast Supply Company on and after July 1, 1946? A. 4,689 pounds.

Q. When was that account closed?

A. On the 30th of August, 1946.

Q. And the processing account of the West Coast Supply Company, as to the highest amount, highest balance available on and after July 1, 1946?

A. 6,832 pounds.

Q. That was when?

A. That account was inactive since the first of June of 1946.

The Court: Do I understand in that processing account that there was, on June 1st, 6,832 pounds of sugar that was available to be withdrawn and that it remained 6,832 until it was closed?

The Witness: Yes, sir.

The Court: It was indicative, in other words, there were no withdrawals or deposits against that?

The Witness: That's right.

(Testimony of Richard C. Hartt)

The Court: All right.

Q. By Mr. Strong: Until what date?

A. Until it was closed on the 30th of August of 1946. [37]

Q. And how was it closed?

A. By an order from the Office of Price Administration.

Q. Withdrawing that balance? A. Yes, sir.

Mr. Carr: I move to strike both of those. That is wholly immaterial to the issue here.

The Court: Yes.

Mr. Carr: It is prejudging what the Office of Price Administration—

The Court: I do not believe that is binding on the defendants, what they did.

Mr. Carr: That may go out, those two last answers?

The Court: They may go out.

Mr. Strong: I will agree.

Q. The Government Exhibits for identification, Nos. 3, 4, 5 and 6—those four checks—were they entered any place on these ledger sheets, Government's Exhibit 1?

A. Yes, sir.

Mr. Carr: I am going to object to that until the checks are in evidence, your Honor. I do not think that it is proper to, by indirection, put the checks in evidence.

The Court: Is this witness familiar with the signature on the checks?

Mr. Strong: Yes, your Honor.

The Court: Has there been any testimony to that effect? [38]

(Testimony of Richard C. Hartt)

Q. By Mr. Strong: Are you familiar with the signature on the checks, which are Government's Exhibits 3, 4, 5 and 6? A. Yes, sir.

Q. Do you know whose signature it is?

A. Paul J. Ziegler.

Q. The defendant? A. Yes, sir.

Q. Is that signature shown anywhere on Government's Exhibit 2? A. It is.

Q. That is the authorized signature card?

A. Yes, sir.

Mr. Strong: I offer in evidence Government's Exhibits 3, 4, 5 and 6.

Mr. Carr: Now, at this time, your Honor, I have numerous objections to that question.

I suggest, may it please the court, that probably you want to exclude the jury. It is going to take some little time. It is going to involve a study of a legal situation which I am sure your Honor would prefer to have just in your presence.

I should say it will take at least a half an hour, your Honor.

The Court: Is there anything in the legal argument that might prejudice in any way the jury? [39]

Mr. Carr: Well, I don't think so. But I know your Honor's disposition to usually have these matters out of their presence. But I am not reluctant to have it in their presence. I will tell you what the proposition is.

The Court: If it is a legal proposition, I think the jury might be interested in hearing the argument. It does not go to the facts.

Mr. Carr: It may develop further facts.

You will recall this morning that counsel made the statement, which is in the record, to the effect that the information was being amended because there was some question as to whether part of this signature, whether there had been some additions or alterations.

I do not remember his exact language.

Now, I want to address the court on the proposition of law and cite some cases.

First I want your Honor to look at the checks and note that on the face of the checks that, I should like to urge, there appears suspicion of alteration on the face.

Now, if you prefer to have this out of the presence of the jury, I shall be perfectly willing to abide by your Honor's ruling before I point up the facts on the checks.

The Court: The jury might like a few minutes' recess.

You will remember the admonition I have given you, ladies and gentlemen of the jury. [40]

You will not discuss this matter among yourselves or permit anyone to discuss it in your presence and not express or form any opinion as to the merits of the controversy until it is finally submitted to you under the direction of the court.

You will return to the jury room until we call you as soon as the argument is concluded.

(Jury excused at 2:50 o'clock p. m.)

The Court: Proceed, Mr. Carr.

Mr. Carr: May I, your Honor, have those checks, if you please?

The Court: Yes. Hand them to counsel, Mr. Cross.
(Documents handed to counsel.)

Mr. Carr: Now, I want to first address myself to the checks and then point up Mr. Strong's statement this morning.

We have here a check purportedly drawn by West Coast Supply Company, which is in typing and which is again a partnership. The information charges them as a partnership.

It is fundamental, and I have numerous authorities to cite your Honor that in the case of a partnership or the case of any check where somebody is signing a check in behalf of a company, corporation or partnership, there must be the showing of the authority of that person to act for that partnership.

That is a very sound rule in a civil case. But it goes [41] even further in a criminal case because the cases very distinctly hold that to charge a partnership you must bring home knowledge of the act plus the acquiescence.

On the face of these checks you will see indication of alteration, in my opinion. In the first place you will note—and here is the check that definitely shows it—you will note that—

The Court: Exhibit number what?

Mr. Carr: The exhibit number of No. 5, your Honor.

You will note that check on which appears the printing in ink "West Coast Supply Co." It is abbreviated—"West Coast Supply Co."—and is in a different handwriting, a different colored ink than the signature or the body of the document which, on the face, creates a suspicion of an alteration.

In other words, it does not indicate that the party, Paul J. Ziegler, signed "West Coast Supply Co." At least the suspicion is created.

In the light of counsel's amendment and in the light of his statement raising, himself, the question I want to cite

in a moment the cases which hold that he must eliminate the suspicion from the document before he can offer it in evidence.

That is a very sane rule because if a document has been altered, it is certainly not binding on a person, even in a civil matter, and particularly would it not be binding in a criminal matter. [42]

If you will compare that, that check with, for example, Exhibit No. 3 for identification, you will find, your Honor, that the check, the body of the check, is made out in the same type of ink; that the signature is in that type of ink. It purports to be the signature of Paul J. Ziegler.

However, up above Paul J. Ziegler's name is printed in by typewriting "West Coast Supply Company."

Now, take the check, Exhibit No. 4 for identification, and you will note the same situation exists. The ink of the signature is the same as that written in the other part of the check, except if you will look at the words "West Coast Supply Co." you find it typed in and typed in in a different typing from the other checks and different from the check where the ink is put in.

If you take a look at the check, Exhibit No. 6, you will find that the ink, the writing, the signature of what purports to be Paul J. Ziegler, is the same apparently as the writing which fills in the check, except a third and different form of typing from a typewriter appears over that signature.

We have counsel's statement this morning saying that one of the reasons that he wanted to amend the information was that there was some question about the execution of these documents.

That certainly creates a suspicion. [43]

And the question is now, What is the law? And I am prepared when your Honor is ready if—

The Court: I am ready.

Mr. Carr: —I may proceed.

First I want to give you a District Court case in Pennsylvania, *United States v. McCain*, Eastern District of Pennsylvania, 1 Fed. (2d) 985.

Indictments were returned September 9, 1924, against George McCain, charging him with the sale of whiskey at Chester, Pennsylvania, on March 11, 1924, “ . . . unlawful possession of whiskey on that date and on the same date of maintaining a nuisance at a hotel conducted by him as a place where whiskey was sold and kept . . . ”

Both of the defendants were found guilty, your Honor.

“At the trial, it was shown that William Walters was a barkeeper employed by McCain, and sufficient evidence was produced for the case to go to the jury upon the question as to whether McCain was chargeable with the sale of whiskey by Walters as his employee”

A Government witness, an officer of the State Constabulary, testified that in March he bought whiskey from Walters.

“On cross examination the attorney for the defendants produced and showed to (the officer) an information under oath, sworn to by him before a justice of the peace of Delaware County, which was subsequently [44] identified as an information accompanying a return of the magistrate to the court of quarter sessions of Delaware County, certified by the magistrate on May 6th, 1924. The return of the magistrate was attached to an indictment against McCain and Walters, returned by the grand jury in the court of quarter sessions . . . charging sales of liquor by the defendants on May 3, 1924.

“Upon (the officer’s) cross-examination . . . he was merely shown the signature to the information . . . and asked if that was his signature, to which he answered in the affirmative. The record (of the court of quarter sessions) was . . . offered in evidence at the close of the defendants’ case for two purposes: First, to show a prior acquittal in the Delaware County Court for the same offense . . . and, second, for the purpose of contradicting the (officer) who had testified that he was not in Chester on the 3rd day of May, 1924. The record was objected to by the assistant district attorney upon the ground that there was a material alteration in the sworn information. . . . Upon inspection, it was found that the figure ‘3rd’ and the word ‘May’ had been written in typewriting into the affidavit after other words and figures indicating a date in March had been erased, and that the same [45] alterations had been made in the jurat of the justice of the peace. No explanation having been offered of the apparent alterations of the record, the record was excluded as evidence to impeach the witness Austin, and as evidence of prior acquittal . . .”

In other words, he was claiming there he had been in jeopardy on this thing. The affidavit was offered, but the court excluded it on the suspicion it was altered. The court denied a motion for new trial and in arrest of judgment, holding that where suspicion is raised to the genuineness of an altered document, the party producing the document is bound to remove the suspicion by accounting for the alteration before it is admissible in evidence.

The court said on page 986:

“Upon the question of the exclusion of the altered affidavit and the return of the magistrate, the general rule is that, where suspicion is raised as to the genuine-

ness of an altered document, the party producing the document is bound to remove the suspicion by accounting for the alteration. . . . The alteration was entirely apparent, and it was material because the paper was offered to prove a prior sworn admission by the witness Austin”

I read that case first because I now want to cite a Supreme Court of the United States case. [46]

In that particular case, which is *Smith v. United States*, 69 U. S. 219—this was before the court on a writ of error to the Circuit Court for the Northern District of Illinois—suit was instituted by the United States for debt on the official bond of Charles N. Pine, the late United States Marshal. Verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error.

At the trial the plaintiffs offered the bond in evidence, but defendants objected to the reading of same as inadmissible because it had been altered by the erasure of the name of one of the sureties. Plaintiffs acceded to this objection and called the District Judge as a witness, who testified that when the bond was brought to him for approval it was then the same as it was when offered in evidence, except that the name of the sureties were inserted by him in the introductory part. He further testified that, when the bond was brought to him, the erasure was there and that he had been told by the Marshal and Hoyne that the latter did not wish his name to remain and that he had erased it. The judge held the bond for several days, and all of the sureties but the defendant, Smith, came in and acknowledged its execution.

Smith is the man who is taking this writ of error.

Then the judge signed the certificate, saying all of the signatures were genuine from his own knowledge and that Smith's was genuine from other evidence which had come to his [47] attention. He said he did not know whether Smith ever consented to the erasure.

The bond was again offered and received.

Hoyne testified that at the time the bond was circulated for the signatures of sureties, he signed with the others but that later he decided that he did not want to serve as a surety and told the others that he intended to remove his name. Smith was absent at the time. The erasure was made before the bond was approved, but when and by whom he did not know.

The plaintiffs conceded that the erasure had been made after the defendants signed the bond and that the alteration was apparent on the face of the instrument.

Smith contended that he was discharged from liability on the bond in consequence of the erasure and that the alteration was made without his knowledge or consent.

Smith asked, among other things, that the court instruct the jury if the jury believed that Hoyne's name was erased without his knowledge, the jury should find the issue in his favor;

That the law places the burden of proving consent upon the plaintiffs.

Now, the Supreme Court held, your Honor, that the plaintiffs must account for the alteration and variation and that where it was made without the knowledge and the consent of [48] Smith, he is properly discharged of liability under the bond.

Here is what the court says at page 791:

"The general rule is that where any suspicion . . ."

Note that: any suspicion!

“ . . . is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. 1 Greenl. Ev. 564. Exceptions to the rule undoubtedly arise, as to where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title . . . ”

We do not have that situation here.

“ . . . but the case under consideration obviously falls under the general rule . . . Every material alteration of a written instrument, according to the old decisions, whether made by a party or by a stranger, was fatal to its validity if made after execution, and while the instrument was in the possession and under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration. . . Grounds of the doctrine, as explained in the early cases by the text writers, were two-fold. First, That of public policy, which dictates that no [49] man should be permitted to take the chance of committing a fraud without running any risk of losing by the event in case of detection. Second: To insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned. . . ”

Quoting further from Taylor on Evidence in the Supreme Court case, the court said:

“ . . . where the alteration is apparent on the face of the instrument, the party offering it in evidence and claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover.”

Now, I submit, if the court please, if that is the rule in a civil case where you are trying and attempting to bind a defendant in a criminal case where you have to prove beyond a reasonable doubt his connection with that document and that he executed it as it now stands, that the rule is even more stringent; that the burden is now upon Mr. Strong, to-wit, the Government, to eliminate the suspicion which he himself has cast upon those exhibits.

I submit they are not admissible in evidence for other grounds.

The next ground is the proposition of proof of authority to execute and the admission of altered documents. I combined this memorandum. [50]

No partnership, no corporation, your Honor, can have a check introduced in evidence against it until the authority is established, the agency, if the court please.

I cannot go out here and write out a check on the Bank of America and put the Bank of America's name over the top of my signature and bind the Bank of America.

I submit in addition to the suspicion of alteration there has been absolutely no proof of authority on behalf of the West Coast Supply Company.

How did the West Coast Supply Company name ever get on these checks? That has got to be established. Where is the authority?

Now he is offering them in evidence without even laying that foundation.

In connection with the law, I think your Honor does not need to have authorities to state that you cannot, for example, prove agency by the act or declaration of an agent. It is wholly insufficient.

First, suspicion has been created with respect to alteration. Secondly, no authority has been shown for the appearance of the name "West Coast Supply Company" on those checks: absolutely none.

Respecting the proof of authority to execute, I have numerous cases. I shall just try to pick out two or three, your Honor, and save as much time as possible. However, I have [51] a rather voluminous rough memorandum here. It is headed "Proof of Authority to Execute. . ."

Here, starting back with the Federal case No. 7,181, as an action of ejectment by the lessee of plaintiff James against Gordon & Bowen, the defendant offered in defense a paper in evidence signed by one Richard Peters, as attorney for William Peters. In connection with this offer in defense the court stated at page 307:

"You must produce the power of attorney, under which the agent acted."

Here is a Federal decision, *Arnold v. Thompson & Spear Co.*, 297 Fed. 307.

This was a case in which the suit was for a balance of money claimed due for certain work on a contract with the United States for construction of a general storehouse at a submarine base. He entered into a sub-contract with the corporation to do the plumbing. In the sub-contract the Navy Department was named the owner and the Bureau of Yards and Docks the architect.

Now, the sub-contract required acceptance by them. The defendant offered in evidence a carbon copy of a letter purporting to have been written to Arnold by Bakenhus, who described himself as "Assistant to the Bureau," written on the letterhead of the Bureau of Yards and Docks.

The court reversed the judgment in that case, your [52] Honor, because there was no showing of his authority on that particular document. The mere writing of his name across the top "Assistant to the Bureau" did not mean a thing. There was no proof of his authority at all.

At page 11 the court says:

"The mere fact that he describes himself as 'Assistant to the Bureau' does not establish his authority to speak for it."

I have a Pennsylvania case here, your Honor, reported in 262 Fed. 545, District Court of Pennsylvania.

This was an action on a contract alleged to have been made by correspondence. The plaintiff offered in evidence a letter purporting to be signed by defendant corporation.

There is no difference between the authority of a corporation; that is the real substance of the rule. It might require minutes or something of that kind. But the authority, in any case, would have to be proved.

Here was a letter by the defendant corporation purporting to accept the terms proposed in the letter received from the plaintiff. The defendant contends that there was no evidence that the letter accepting the contract was the letter of the defendant or written by his authority. The court held that the letter was admissible as prima facie that of defendant without proof that the person signing it had authority to make the contract. Then the court said at page 547: [53]

"No proof of signature was required, but the letter was objected to on the ground that the defendant, being a corporation, could sign a letter only by the hand of some natural person, and that the authority of the person who signed the letter to make a contract should be shown before the letter could go in evidence."

In the case of *Denn v. Reid, et al.*, 35 U. S. 524—this was an action for ejectment—the District Court asked that certain questions of law be certified to the Supreme Court. The defendants, to prove that they were purchasers of the land in controversy under James Conner, offered in evidence a deed from Conner to Reid. Deeds were all signed by Henry W. M. Conner, agent and attorney in fact for James Conner, but no evidence as his authority to act as attorney was offered.

The court stated at page 528:

“The deeds which purport to have been executed by Henry W. M. Conner, as agent and attorney in fact for James Conner, cannot be received as evidence for any purpose in the absence of the proper authority by the agent.”

Your Honor, I have many other cases here on which I shall not insist. But here is one further case to which I should like to refer: *The Ninth Circuit, Collins v. Streitz*, C.C.A. 9, 95 Fed. (2d) 430.

This was an action for damages for trespass to real [54] property. Over the plaintiff's objection the defendant introduced a deed conveying Collins' interest in the property. It was objected to on the ground that it was void on its face, it being a deed of gift by an attorney in fact of her principal's property. The deed was executed by “Julia Winifred Mosher-Collins by Hattie Lount Mosher, her attorney in fact.”

Now, there is the writing on a document. The court held that the deed executed by the grantor's attorney in fact was admissible in evidence notwithstanding lack of proof of authority as attorney in fact, where opposing counsel did not question authority of the attorney in fact,

and objected merely that the deed was void on its face. In other words, he failed to make the objection in the lower court, the same objection that I am now making.

The attorney failed to make that objection. The court, however, discussed the law relating to the admission of such documents and said at page 435:

"But the deed before us shows on its face to have been executed by one acting as attorney in fact. The acknowledgment is evidence of execution by Hattie Lount Mosher as attorney in fact for Julia Winifred Mosher-Collins, but her authority to act as such is, of course, not established thereby.

"Nor does any evidence appear in the record bearing on the question of the authority of Hattie L. Mosher [55] to act as attorney in fact for Julia M. Collins. . .

"This is not an occasion where an evidentiary gap may be filled by a presumption, for there is no presumption that one purporting to act for a principal is authorized so to do."

It so happened that the unfortunate thing about that case was that the lawyer did not make the objection in the lower court, but the court states the rule.

Now, if the court please, there are two things. I submit he must remove the suspicion from those documents by proof and at the same time he must establish the authority for the name "West Coast Supply Company" to be on there. And more than the authority, he must show the knowledge of the West Coast Supply Company that it was on there at the time the check was executed and that it was on there with the knowledge of the West Coast Supply Company.

I submit those documents are not admissible in evidence.

The Court: Mr. Carr, I agree with your statement of the law with reference to alteration.

Where is the alteration on any of these checks? They are all very clear: "West Coast Supply Company."

I am looking at the exhibit which is a written check, Exhibit 5. There is no alteration in that name.

Mr. Carr: Your Honor, can you say that after Mr. Strong has made the statement— [56]

The Court: I cannot change the exhibit. If you can show me where there is any word or any letter that is changed in the writing "West Coast Supply Company," I wish you would point it out.

Mr. Carr: I cannot show you any. But I can say that the evidence is going to show that "West Coast Supply Company" was put on after the check was issued.

The Court: I cannot anticipate.

Mr. Carr: There was some question about alteration.

The Court: Well, you are asking me to anticipate evidence.

Mr. Carr: No, I am asking you to require the Government—

The Court: Wait a minute. To require the Government to remove a suspicion of an alteration when there is not any on the exhibit?

Mr. Carr: Well, I respectfully, your Honor, disagree with you.

The Court: Point it out to me. You point it out on any one of those exhibits where there is any alteration, any erasure or any change.

Mr. Carr: I say that on this check, Exhibit 5, when the ink appears to be in a different type of ink, a different type of handwriting, that that creates a suspicion.

The Court: Why, not a bit. You know the general commercial practice of secretaries to write out the whole check at [57] times and have the signature sometimes written out in the handwriting of the person on whose account the check is to be drawn.

Mr. Carr: That is true.

The Court: You say that that raises a suspicion that it was an erasure and it is incorrect because the writing on the check, the date, the payee of the check is in different handwriting and possibly different ink; that if the person who draws the check happens to use a fountain pen or something, that that show an alteration or a suspicion that it is not by the same handwriting as the person upon whose account it is drawn and signed?

Mr. Carr: It may, your Honor. I am not sure of that.

The Court: We are not going to speculate on that.

Mr. Carr: It certainly does in the light of counsel's statement.

The Court: I will allow an exception. I want to hear from the Government on the second point here, what evidence is here on these checks to bind the partnership.

Mr. Strong: Now, your Honor?

The Court: Yes.

Mr. Strong: The first piece of evidence is Government's Exhibit 1.

The Court: I have examined that carefully. That is the authorization I have seen in a million banks in the [58] country.

Mr. Strong: It provides for the West Coast Supply Company and the authorized signatures include the same signature that appears on these checks.

Your Honor can determine that by a simple examination without the aid of an expert witness.

The name "Paul J. Ziegler" is obviously exactly the same on the authorization card as it is on these other checks.

The Court: That is the testimony in the court.

Mr. Strong: Yes, sir.

The Court: It will be a matter for the jury. But how does that bind the partnership? What authority is there to show that the partnership is bound? That is the point I want now.

Mr. Strong: Well, your Honor, that depends upon what authority is being sought.

Here the entire argument of Mr. Carr relates to the civil law of agency, of negotiable instruments and of partnership. It has absolutely nothing to do with criminal law.

In this particular case we have not as yet established that Mr. Ziegler—I will admit that—is acting with the knowledge or pursuant to the authority directly granted to him to perform these very criminal acts which we charge. That we have to establish. That I cannot establish by my first witness, obviously. I have 35 others. [59]

But up to this point I think that the check is admissible as against Paul J. Ziegler, also it may not be binding at this point as against West Coast Supply Company.

I have evidence which I intend to introduce to show wherein Mr. Ziegler has the authority, at least from the criminal standpoint, without regard to agency or partnership or negotiable instruments, which is different law, your Honor, but under this criminal information where Mr. Ziegler's acts are in effect the acts of the West Coast

Supply Company, so as to bind him criminally, as I will show through other witnesses which I have.

At this time—

The Court: There is not any evidence yet to offer those exhibits against the partnership.

Mr. Strong: Very well. I should like to offer these, limited to Paul J. Ziegler and not against the partnership.

The Court: I shall withhold my ruling on that until you reach the other part of the testimony which I think will be more proper.

Mr. Carr: May I add, your Honor, to get it out of the way, the further objection that under the Revised Ration Order No. 3, under all of the sections, the banking sections, the deposit sections, require that the account—in other words, let me state it very simply this way:

To be an offense here there would have to be an account [60] in the name of the West Coast Supply Company and the check itself would have to be drawn as against that account.

If the West Coast Supply Company name is put on there without their knowledge, criminal knowledge, then I must reserve the objection to object later to the introduction of the exhibits as against Ziegler, too because then I will contend that it was not a ration check within the meaning of Third Revised Order No. 3.

The Court: It is so understood.

We will take a recess, gentlemen, for 15 minutes.

Mr. Carr: May I just say, your Honor, I am sorry if I asked for the jury to go out wrongly; but I thought this matter might be a thing that they should not hear at the time.

The Court: That is all right. They got a little rest.
(Brief recess.)

(The following proceedings were had in the presence of the jury:)

The Court: Do you stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Do you stipulate the defendant is in court?

Mr. Strong: So stipulated.

The Court: Proceed.

Mr. Strong: Mr. Hartt. [61]

RICHARD C. HARTT (Recalled)

Direct Examination (Resumed)

Mr. Strong: May I have these documents marked for identification as the Government's next exhibit in number? There are seven slips stapled together.

The Clerk: Government's Exhibit No. 7 for identification.

(The documents referred to were marked as Government's Exhibit No. 7 for identification.)

Q. By Mr. Strong: In connection with Government's Exhibits 3, 4, 5 and 6 for identification and Government's Exhibit 1 in evidence, will you state what the custom of the Union Bank and Trust Company is as to sending out copies or originals of these ledger statements, Government's Exhibit 1, to the party whose account it is?

A. They are sent out once every three months.

Q. And in the case of Government's Exhibit 1 in evidence, was such a statement sent out, as far as you know?

A. Yes, sir.

(Testimony of Richard C. Hartt)

Q. And to whom would that be sent, if you know?

A. That would be sent to the West Coast Supply Company.

Q. Did you at any time after the sending of the statement, the original or duplicate of Government's Exhibit 1, receive any complaint or any statement or any information from anybody at the West Coast Supply Company to the effect [62] that these amounts of sugar shown charged here, which you have checked off as represented by the checks, Government's Exhibits 3, 4, 5, and 6 for identification, were improperly charged against the West Coast Supply Company account?

Mr. Carr: That is objected to as asking for a conclusion of the witness, going outside the issues of the case.

Mr. Strong: I think, your Honor, it is within the issue.

The Court: Overruled, and exception noted. It may be answered.

The Witness: No.

Mr. Carr: I wasted your Honor's time, I am afraid. I am sorry.

The Court: It is proper, you will understand, for counsel on both sides to make objections to evidence, but it is the duty of a lawyer. Whether the court sustains the objection or overrules it, that is not to be considered by the jury. That is the ruling of the court. If the court excludes testimony, you are not to consider it. If the court overrules the objection, you are to consider it. But it is the duty of counsel to make objections, if they feel that evidence is not properly before the court.

(Testimony of Richard C. Hartt)

Proceed.

Q. By Mr. Strong: I show you the series of documents which have been stapled together and marked as Government's Exhibit 7 for identification. [63]

Would you please state what those are, if you know?

A. These are deposit tickets for the credit of the West Coast Supply Company on their sugar ration account.

Q. And those are deposit slips about which you spoke before in giving us a resume of the account procedure at your bank?

A. Well, these are the deposit slips which appear on the statement.

Q. Which appear on the statement, Government's Exhibit 1? A. Yes, sir.

Q. Would you look at each and every one of the deposit slips which constitute Government's Exhibit 7 for identification and state, if you know, whether those deposits were received by the Union Bank and Trust Company from the West Coast Supply Company?

A. Yes, sir.

The Court: How many deposit slips?

The Witness: Six.

The Court: All right.

Q. By Mr. Strong: The last document attached as part of Government's Exhibit 7 for identification is not a deposit slip? A. No. That is—I will just say no.

Q. What is it? [64]

A. That was a credit that we put to the account to balance the account and wipe out the overdraft that was then showing on the account.

(Testimony of Richard C. Hartt)

Q. Will you state, if you know, who inserts the details, the pencilled details, which are shown on these deposit slips?

A. I couldn't truthfully say who makes these deposit tickets up. I presume it would—

Mr. Carr: Just a moment, not what you presume; just what you know, what you did yourself in connection with these.

The Witness: We receive them as deposits.

Mr. Strong: I offer these in evidence.

The Court: Do I understand that the last page there was a deposit by the defendants here of ration stamps to balance the account?

The Witness: No, sir.

The Court: Well, I understood that to be the testimony.

Mr. Strong: No, your Honor.

Q. Would you state what this slip represents?

A. That last slip represents a credit to the account. The account was credited, through an order from the Office of Price Administration to close the account and eliminate the overdraft that then appeared on the account.

Q. That was to balance the accounts of the Union Bank?

A. Not necessarily to balance our accounts, just to close the account out. [65]

Q. Yes. As I understand it, this last slip does not represent a credit on behalf of the defendants to cover the overdrafts of which you spoke as shown on Government's Exhibit 1?

A. No, sir.

Mr. Strong: I offer these documents in evidence, your Honor.

(Testimony of Richard C. Hartt)

The Court: In evidence.

The Clerk: Government's Exhibit No. 7 into evidence.

(The documents referred to were marked Government's Exhibit 7 and introduced in evidence.)

Mr. Strong: May I have these seven ration checks marked as Government's exhibit next in number for identification?

The Clerk: Government's Exhibit 8 for identification.

(The documents referred to were marked Government's Exhibit 8 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 8 for identification and ask you if you ever saw these checks before? A. Yes, sir.

Q. Will you state what they are?

A. Sugar ration checks against the account of the West Coast Supply Company.

Q. Signed by what name?

A. Signed by Paul J. Ziegler. [66]

Q. Were those checks put through your bank?

A. Yes, sir.

Q. Were they charged against the West Coast Supply Company account? A. Yes, sir.

Mr. Carr: May I ask you to state which account as you go along, Mr. Strong?

The Court: Yes, which account?

The Witness: Well, there are—

Mr. Strong: I submit to your Honor that that does not make any difference which account. They are being offered for the purpose of balancing.

The Court: Counsel may have some point. If he has, he is entitled to know.

(Testimony of Richard C. Hartt)

The Witness: They are divided between the industrial and the wholesale accounts.

The Court: How many?

The Witness: Five of them are marked "industrial," one is marked "wholesale," one is marked "wholesale," and one doesn't have a marking.

I would have to check it on the bank records to see which account it is charged against.

The Court: Proceed, counsel.

Q. By Mr. Strong: Do you have those records here?

A. No, sir. That is prior to the records that I [67] brought, this one check.

Q. In each of these instances represented by these checks, as I understand it, the amount of sugar which is shown transferred by the check was withdrawn from the West Coast Supply Company account, as shown by the check?

A. Yes, sir.

Mr. Strong: I offer these in evidence, your Honor.

The Court: Now, the one there that—

Mr. Strong: May I withdraw that one?

The Court: Yes. If it is prior, as he says, to the time here, I do not see that we are interested in it.

Mr. Strong: I think they are all prior, your Honor.

Mr. Carr: May I inquire what the purpose of the offer is, because they are all prior to the charge, your Honor.

The Court: What is the purpose if they are prior to the time of the charge?

Mr. Strong: The purpose is to show that Mr. Ziegler was acting on behalf of the West Coast Supply Company at the time of the charge, prior to the time of the charge and at various times.

(Testimony of Richard C. Hartt)

The Court: It is limited to that, but it is quite serious if it was injected in any way into the offense alleged in this information.

Mr. Strong: It is not the purpose of the Government to use these checks as the basis of showing any overdrafts, such [68] as those alleged in the information. It is being offered for the purpose, express purpose, of showing that Mr. Ziegler, Paul J. Ziegler, whose signature appears on these checks, is the person who has been in the past drawing checks for sugar against the account of the West Coast Supply Company at the Union Bank and Trust Company.

Mr. Carr: May I just interpose this objection?

The Court: Yes.

Mr. Carr: The same objection that I made a while ago that it is not connected up to show from the criminal standpoint knowledge or participation and has nothing to do with the issues in this case.

If it is merely offered to prove the signature, that is different. But I object to it on those grounds. It raises a collateral issue.

The Court: It is offered for the limited purpose stated by the Government. In evidence.

The Clerk: Government's Exhibit 8 in evidence.

(The document referred to was marked Government's Exhibit 8 and introduced in evidence.)

Mr. Strong: May I have this document marked for identification, your Honor?

The Court: Yes.

The Clerk: That will be Government's Exhibit 9 for identification. [69]

(Testimony of Richard C. Hartt)

(The document referred to was marked as Government's Exhibit No. 9 for identification.)

Q. By Mr. Strong: Mr. Hartt, I show you a document which has been marked as Government's Exhibit 9 for identification, and ask you if you ever saw this before? A. Yes, sir.

Q. Will you state when and where and what it is?

A. This is a report that goes to the Office of Price Administration. This one in particular went on the 31st of July, 1946, showing—

Mr. Carr: Well, I think the document speaks for itself.

The Court: Yes, the document speaks for itself, unless there is something technical about it.

Q. By Mr. Strong: Is that your signature on that document? A. Yes, sir.

Q. Was that document prepared by you or under your direction? A. Yes, sir.

Q. Was it sent by you or under your direction to the OPA? A. Yes, sir.

Mr. Strong: I offer this in evidence, your Honor.

The Court: In evidence.

Mr. Carr: As I understand it, that is just a report on [70] the status of the account. Is that right, Mr. Strong?

Mr. Strong: This is labeled "Bank Report of Overdrawn Ration Account."

Mr. Carr: I object to that on the ground it has no bearing on any issue in this case. The mere fact that the bank would report there is an overdraft cannot be evidence against the defendant in this case, your Honor. Their report is not binding.

(Testimony of Richard C. Hartt)

The Court: I do not think that this bank officer could make a statement that would be binding on this defendant, counsel.

Mr. Strong: I think that if a series of acts and transactions in which participate various individuals, including bank officers, Government agents and representatives of the two defendants—

The Court: Tell me now; give me your third point so I can connect it up. Where are they connected up with this particular instrument?

Mr. Strong: This particular instrument shows on its face it is a report of overdraft against the West Coast Supply Company of a certain number of pounds of sugar.

The Court: How does that bind either of the defendants in this case?

Mr. Strong: This document may not on its face bind the defendants at this point. [71]

The Court: I will sustain the objection at this time. Proceed, counsel.

Mr. Strong: All right. That is all.

The Court: Cross examine.

Cross Examination.

By Mr. Carr:

Q. Mr. Hartt, I believe you testified that Exhibit 1 represents a statement respecting the three accounts at the Union Bank and Trust Company maintained by the West Coast Supply Company? A. Yes.

Q. Those three accounts were designated as follows: After the words "West Coast Supply Company" I notice the word "wholesale."

(Testimony of Richard C. Hartt)

On the second sheet I notice the word "industrial" at the top of the page. And on the third sheet I note the word "processing." So that these purport to represent three separate accounts? A. That is right.

Q. Now, when a check came into the bank, a sugar ration check purporting to be drawn by the West Coast Supply Company, ordinarily it had on it the designation of what account from which a withdrawal was being made, did it not?

A. Numerous times it did not. [72]

Q. I call your attention here to the Government's Exhibit 8. Do you note that on those checks after the words "West Coast Supply Co." it has the word "industrial," or some designation as to the account?

A. Yes, sir.

The Court: Now, what exhibit are you looking at?

Mr. Carr: That is Exhibit 8, your Honor.

The Court: 8. All right.

Q. By Mr. Carr: You notice that on those checks there is a designation as to what account?

A. With the exception of one check.

Q. Now, that particular: let us take that. That check is dated 4-29-46—

The Court: April 29, 1946.

Q. By Mr. Carr: —"Sugar Products Co."—"100," and then "One Hundred" written out "pounds of sugar."

It says "West Coast Supply Co., 1654 Long Beach Ave., Los Angeles 21, Calif. Paul J. Ziegler."

How did you determine which account that check would be credited or debited against? Which is the proper expression?

The Court: "Charged to," I guess.

(Testimony of Richard C. Hartt)

Mr. Carr: Sir?

The Court: "Charged against."

Mr. Carr: "Charged against."

The Witness: On any checks that came into the bank that [73] did not specify "industrial" or "processing" they were charged to the wholesale account.

Q. By Mr. Carr: You just did that, did you, as a matter of your own practice?

A. Through authority from the West Coast Supply Company because—well, that is enough. I won't say any more.

Q. Well, let me ask you: You say "authority." What do you mean by "authority"?

A. Well, on numerous occasions their accounts were mixed up because where they intended to draw a check against their industrial account they did not so mark it. We charged it against their wholesale account, and on numerous occasions the accounts were out of balance. So we took it up with them—

The Court: With whom?

The Witness: The West Coast Supply Company.

The Court: Well, who? You have to specify who.

Q. By Mr. Carr: Who?

The Court: With whom did you take it up?

The Witness: Now, I presume with the bookkeeper. I couldn't say definitely that it was Paul Ziegler or Allan Ziegler or anybody else. I don't know. But they told us—

Mr. Carr: Well, now, I submit, if your Honor please, he cannot say who they are unless he identifies them.

The Court: Give us your best recollection, if you can.

(Testimony of Richard C. Hartt)

The Witness: My best recollection is that Mr. Ziegler, [74] Mr. Paul J. Ziegler, came up to my office one day.

Q. By Mr. Carr: When was this?

A. Well, I would imagine in the early part of '46.

Q. Well, January, February?

A. Maybe in February.

Q. Who was present at the time? Did you have a conversation? A. Myself.

Q. You had a conversation with him? A. Yes.

Q. And you say that he gave you some instructions at that time?

A. Well, the accounts were, as I say, mixed up. I told him they had forgotten to specify which account some of the checks were to be charged to.

If my memory serves me correctly, it was Mr. Paul Ziegler who said, "Anything that does not specify 'Industrial' or 'Processing' charge those checks to the wholesale account."

Q. And you did that thereafter? A. Yes, sir.

Q. This exhibit No. 2 in evidence, Government's Exhibit No. 2, except for being a ration banking authorized signature card, is the usual card you have at the bank, is it not? A. Yes, for ration accounts only.

Q. But I mean it is similar to the cards that you have [75] in ordinary banking, is it not?

A. Yes, sir.

Q. All right. Now, I notice at the top of the card it says "West Coast Supply Co.," and then the words "Manufacturing Dept." which are marked out.

Do you know who marked that out?

A. I could not say that I do.

(Testimony of Richard C. Hartt)

Q. Do you know why it was marked out?

A. Why, I presume that they didn't have a manufacturing department at the West Coast Supply Company.

Q. Well, now, Mr. Hartt, I do not mean to be discourteous; but I don't want your presumption. Do you know why it was—

A. No, sir.

Q. Now, over on the right-hand—

The Court: Did you mark it out?

The Witness: No, sir.

Q. By Mr. Carr: On the right-hand part of the card, the upper corner, I notice it says "Processed Foods." Then it says "sugar 2-5-43."

Is that the date the account was opened for sugar?

A. Yes, sir.

Q. Then it has some initials "M. F. . . ." What is that?

A. Meats, fats, fish and cheese.

Q. In other words, it covered all of those items? [76]

A. All of the rationed commodities.

Q. Yes. Now, under the printing "Authorized Signatures" and over on the left-hand side it says "Name and Title (Print)."

You have in typewriting there "Raymond Ziegler Managing Partner"?

A. Uh-huh.

Q. Who put that on there, do you know?

A. No, sir.

Q. Do you know who put the typing on here "J. H. Ziegler"?

A. No, sir.

Q. Do you know who put the printing in ink on it, "Paul J. Ziegler"?

A. No, sir.

Q. Do you know who put on here in typing "Paul M. Fox"?

A. No, sir.

(Testimony of Richard C. Hartt)

Q. Then over here you have a signature under the word "Signature" in handwriting. It says "Raymond Ziegler" opposite the words "Managing Partner."

You did not see him sign that, did you?

A. No, sir.

Q. But you did accept as his signature for that partnership?

A. Yes, sir.

Q. And, as I understand it, you accepted that merely [77] as the signature on a ration check, and that is all?

A. Yes.

Q. You had no document filed with you showing who the partners might be of this particular concern?

A. Not to my knowledge.

Q. You do not know, for example, whether the signature "Paul M. Fox"—whether he is a partner or an employee or just who he is?

A. No, sir.

Q. As a matter of fact, you do not know whether Paul J. Ziegler is a partner or not, do you?

A. No, sir.

Q. Now, I want to direct your attention to Exhibit No. 5 for identification, Government's Exhibit 5.

That is a check dated 7-1-46. It is made out to the Streckels Sugar Co. It is in pen and ink, except when you get down to the words on the first line it says "Print or Type Name of Your Account."

Then there appear the following: "West Coast Supply Co."

When a check came to your account to be cleared in the bank, signed in that fashion, how did you determine whether or not that check was executed by the authority

(Testimony of Richard C. Hartt)

of the West Coast Supply Company? Did you make any inquiry at all? A. Never do. [78]

Q. Just accept the check on its face?

A. Yes, sir.

Q. And you don't know whether or not those words were written in after that check was executed, do you?

A. No, sir.

Q. How long have you been with the bank?

A. 11 years.

Q. In that position have you had considerable experience with handwriting? A. Yes, sir.

Q. In general, in what departments have you worked, sir, while you have been there?

A. Well, I have been a savings teller, a note teller, general ledger bookkeeper, manager of the savings department, chief clerk, manager of the adjustment department.

Q. Those duties have also encompassed a pretty complete study of handwriting? A. Yes, sir.

Q. So that it is your business when checks pass over your counter, for instance, as a savings teller, you have to make it a practice of checking handwriting, do you not? A. Well, yes.

Q. From your experience are you able to discern the difference in handwriting?

A. To discern a difference in handwriting? [79]

Q. Yes. For instance, if two types of handwriting appear on a check, from your experience would you be able to discern that difference?

A. Well, fairly well.

Q. All right. I will show you Exhibit No. 5 here, Government's Exhibit No. 5 for identification. I want

(Testimony of Richard C. Hartt)

you to look now at all of the handwriting on the check. You will notice it says "7/1" and the "six" is in pen.

"Spreckels Sugar Co." is in pen and ink. "Thirty Thousand" is in pen and ink written out, and "30,000" in figures.

You will note that "West Coast Supply Co." is also written out, and beneath it "Paul J. Ziegler" is written in ink.

From looking at that check can you say whether or not the handwriting, representing "West Coast Supply Co." is different from the handwriting in the rest of the check?

Mr. Strong: That is objected to, your Honor. This man is not a handwriting expert. He is a layman.

If there is any question of sameness or difference in handwriting, there ought to be a handwriting expert here.

I think that the jury itself is just as well qualified to determine the similarity or difference as is any lay witness, regardless of how extensive his lay experience is. I think if there is any problem of technical detection of [80] differences, that should come only through a handwriting expert.

I object to that question.

Mr. Carr: May I answer that, your Honor?

The Court: Yes.

Mr. Carr: It is common knowledge, as it is the law, that you can even pass up a signature to a juror, pass on comparative signatures to determine whether or not they are identical. This man is qualified, I think, as a man who has worked in a bank over a period of years. And one of the qualifications of a teller, a banker, is to know handwriting and signatures.

(Testimony of Richard C. Hartt)

I think that it is sufficient for whatever weight it may have with the jury.

Mr. Strong: If your Honor please, I think for any weight with the jury, the jury should examine the document. The expert evidence is only a guide for the jury, and the jury may reject it.

I do not think a lay witness should be called upon to testify to the similarities or differences in handwriting.

The Court: I shall permit him to answer. You may answer.

The Witness: I want to answer in this manner: that there is not handwriting where the "West Coast Supply Co." takes place. It is printed. [81]

Q. By Mr. Carr: Well, it is written by hand.

A. It is printed by hand which, to me, is not handwriting.

Q. Can you distinguish or can you tell from looking at that, from your experience, whether or not the writing indicates it is written by the same person?

A. I cannot.

Q. Did you personally make the decision as to a check that came in, for instance, that did not have "industrial" or "processing" or "wholesale" on it as to which account you should charge that check against?

A. Mr. Paul Ziegler did.

Q. I do not understand you. When the check came into the bank?

A. If it was specified on the check that it was to go to the Processing or Industrial account, Mr. Paul Ziegler is the one who said, "Charge all of those to the wholesale account."

(Testimony of Richard C. Hartt)

Q. Did you give those instructions at the bank?

A. Yes, sir.

Q. To whom? A. To the bookkeeper.

Q. Were they written or just oral instructions?

A. What's that?

Q. Written or oral instructions? [82]

A. Oral.

Q. Is it customary that the bank give oral instructions? A. Yes, sir.

Q. As to which account a check should be charged against? A. Yes, sir.

Mr. Carr: May I have just one minute, your Honor?

The Court: Yes.

(Brief pause in the proceedings.)

Q. By Mr. Carr: Mr. Hartt, was there a prior signature card to this Government's Exhibit No. 2?

A. I do not know.

Q. Have you any way of—

A. I can check and find out.

Q. I see. I am speaking now with reference to Government's Exhibit No. 7 for identification.

I believe this is in evidence. I am not sure. Isn't it?

Mr. Strong: Yes.

The Court: Mr. Cross, is Exhibit 7 in evidence?

The Clerk: Exhibit 7 is for identification, your Honor.

The Court: All right. Those are the deposit slips.

Mr. Carr: I see.

Q. I show you here and call your attention to the last ration deposit slip "West Coast Supply Co. (wholesale acct.)—8-30-46." [83]

Do you know in whose writing that is?

A. Yes, sir.

(Testimony of Richard C. Hartt)

Q. Whose? A. My secretary.

Q. And she wrote that deposit slip out and credited the West Coast Supply Company with 1,351,804 pounds?

A. Yes, sir.

Q. For the period prior to July 1, 1946, say, April, May and June, did not the OPA subpoena the checks from that account somewhere along in that period?

A. No, sir.

Q. Did you have all of the cancelled checks that had been charged against the account up to July 1st on July 1st?

A. Yes. They were down in our statement files.

Q. When did you turn those over to the Government?

A. I don't recall the exact date.

Q. Was it after July 1st?

A. I am pretty certain it was.

Q. Well, I notice this Exhibit No. 1 in evidence, Government's Exhibit—

The Court: The ledger sheets?

Mr. Carr: The ledger sheets, yes, your Honor.

Q. —is dated June 1, 1946. Is that right?

A. June 1.

Q. So the account was apparently closed out by a credit [84] on August 30, 1946? A. That is right.

Q. Now, to do that, could you do that without having the cancelled checks? Could you balance the account without having the cancelled checks? A. Oh, yes.

Q. How would you do that?

A. Well, we just write off the balance, the overdraft balance.

(Testimony of Richard C. Hartt)

Q. How would you arrive at the over balance if you didn't have the cancelled checks?

A. Well, we had all of these cancelled checks appearing on this statement.

Q. I see. You are not sure, are you, Mr. Hartt, about the OPA subpoenaing the checks, for example, in Government's Exhibit 8 in evidence?

A. No.

Q. You do not know whether they were taken out of the bank or not by the OPA?

A. I can't recollect right now. I can check on it and find out.

Mr. Carr: May I, your Honor have him to inquire? He could call me by telephone and tell me. It may be that it will be necessary to recall him.

That is all. [85]

The Court: You can advise counsel on both sides if you find any other instruments such as has been designated by counsel.

Anything further, Mr. Strong?

Mr. Strong: Yes, your Honor.

Redirect Examination.

By Mr. Strong:

Q. As I understand it now, you paid these checks, which are Government's Exhibits 3, 4, 5 and 6 for identification? Your bank charged these against the West Coast Supply Company account on the basis of the signature card, is that right?

A. Yes, sir.

Q. That was your authority for paying these checks?

A. Yes, sir.

Mr. Carr: I object to that as calling for a conclusion of the witness.

(Testimony of Richard C. Hartt)

The Court: Well, that is not a conclusion. I should think, Mr. Carr, that probably is an act and why he did it.

Mr. Carr: Why he did it, yes, your Honor. But he is asking now about the word "authority": "your authority."

I object to the use of the term "authority."

Q. By Mr. Strong: Is that why you did it?

A. Yes, sir.

Q. The slip here, which has been discussed and which [86] is part of the Government's Exhibit 7 for identification, the last slip which shows a credit to the account of the West Coast Supply Company, would you explain that a little more fully, where you got that amount of points and where it came from and what it is?

A. Well, after the posting of all of these checks the account became overdrawn in the amount of 1,351,804 pounds of sugar. We had a form from the Office of Price Administration authorizing us to credit that account and close it out. We pass a credit to the account. Our offsetting debit goes to a miscellaneous column on our records.

Q. Did you receive any of the deposit slips from either of the defendants in the form of these other documents which are part of Government's Exhibit 7 for identification to cover this amount of 1,351,000-some odd pounds? A. No, sir. Those were all prior.

Q. But you received none from the defendants, is that right, for that particular sum? A. No, sir.

Q. So that this sum of 1,351,804 pounds came directly from the OPA? A. Yes, sir.

(Testimony of Richard C. Hartt)

Q. And it did not come to you through the defendants?
A. No, sir.

Q. They did not make a deposit— [87]

The Court: Now, he answered that four or five times, counsel.

Mr. Strong: I was a little confused, your Honor, because this is the first time I had seen. I am sorry if I asked too many questions.

The Court: That is why I asked the first question about it when I saw it.

Mr. Strong: At this time, your Honor, I should like to offer in evidence Government's Exhibit 7 for identification which contains the ration deposit slips.

Mr. Carr: I think they are already in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 7 in evidence.

(The documents referred to were marked Government's Exhibit No. 7 and introduced in evidence.)

Mr. Strong: That is all.

The Court: Mr. Carr?

Mr. Carr: That is all.

The Court: That is all, thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Strong: Miss Colesworthy.

The Court: Give us the spelling, Mr. Strong, for the record.

Mr. Strong: Yes. C-o-l-e-s-w-o-r-t-h-y. [88]

MILDRED E. COLESWORTHY,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Court: State your name and your position.

The Witness: Mildred E. Colesworthy, housewife.

The Court: Proceed.

Direct Examination.

By Mr. Strong:

Q. Mrs. Colesworthy, were you ever employed by an OPA ration board? A. Yes.

Q. When was that? A. From 1942 until 1946.

Q. Will you speak up a little louder?

A. From 1942 to 1946.

Q. What board was that?

A. Board 518, located at 1519 North Gardner.

Q. Who were the members of that board while you were there?

A. Do you want to know all of them?

Q. Well, let me put it this way: was the defendant, Paul J. Ziegler, a member of that board?

A. Yes, he was.

Mr. Carr: I don't know possibly what the purpose of such [89] testimony is. Suppose he was a member of the board?

I object to this as being wholly immaterial. It has no bearing whatsoever on the issues in this case.

Mr. Strong: It has a dual bearing: One, on willfulness; two, on identification of signatures which I will proceed to after I qualify this witness, with your Honor's permission.

The Court: Proceed.

(Testimony of Mildred E. Colesworthy)

Mr. Carr: On the identification of signatures I do not object, your Honor. I will concede to that.

The Court: All right.

Mr. Strong: May I have the question read to the witness?

(Question read by the reporter.)

Q. By Mr. Strong: During what period?

A. Well, I believe it was from about 1942 to 1943. I am not sure.

Q. During that time—

Mr. Carr: To save time I will stipulate to her qualifications to know Mr. Ziegler's signature, if that will save any time.

The Court: All right. Show the instruments to the witness, then.

Mr. Strong: Yes.

Q. I show you Government's Exhibits Nos. 3, 4, 5 and 6 for identification and ask you whether you recognize the signature at the bottom of each of those documents?

[90] A. I do.

Q. Whose is it? A. Mr. Ziegler's signature.

Q. You mean the defendant Paul J. Ziegler?

A. Yes.

Q. On each of these four documents? A. Yes.

Q. I show you Government's Exhibit 8 in evidence and ask you if you recognize the signature on the bottom of each of the checks comprising that exhibit.

Mr. Carr: I will save you time and stipulate, if you will show them to me, on just his signature. My stipulation, of course, only relates to the—

The Court: Identification of the signature?

(Testimony of Mildred E. Colesworthy)

Mr. Carr: —Paul J. Ziegler, nothing about it, your Honor.

The Court: All right.

Mr. Carr: Yes, I will stipulate that that is his signature. But I am not stipulating that the thing above it was put on there by him.

I will stipulate that just the writing "Paul J. Ziegler" is his signature but no stipulation with reference to the rest of the card.

Mr. Strong: That is as to Government's Exhibit 2, your Honor. [91]

The Court: It is so understood.

Mr. Strong: May I have a minute and approach counsel with additional documents?

The Court: Yes.

(Brief pause in the proceedings.)

The Court: While counsel is examining the records, pass to the jury whatever instruments have been introduced in evidence and received in evidence.

Mr. Strong: Yes, your Honor.

(Documents passed by counsel to the jury.)

Mr. Strong: Pursuant to your Honor's instruction, I am passing to the jury Government's Exhibit 1, Government's Exhibit 2, Government's Exhibit 7 and Government's Exhibit 8.

The Court: All have been introduced in evidence?

Mr. Strong: All have been introduced in evidence.

The Court: All right.

Mr. Carr: I will stipulate that on the documents counsel is now binding together, your Honor, only the words "Paul J. Ziegler" are his signature.

The Court: It is so understood.

(Testimony of Mildred E. Colesworthy)

Mr. Strong: May I have these documents marked for identification?

The Clerk: Government's Exhibit No. 10 for identification.

(The documents referred to were marked Government's Exhibit No. 10 for identification.) [92]

Q. By Mr. Strong: Are you familiar with the handwriting of the defendant Paul J. Ziegler?

A. I have seen him sign his signature.

Q. Did you see him write anything else?

A. No, not that I know of.

Mr. Strong: That is all.

The Court: Any cross examination?

Mr. Carr: No cross.

The Court: That is all, thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Strong: Albert F. Leland.

May I approach counsel for a moment?

The Court: Yes.

ALBERT F. LELAND,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Albert F. Leland.

Direct Examination.

By Mr. Strong:

Q. Mr. Leland, what is your occupation?

A. I am a food broker, Mr. Strong. I am employed by [93] Mailliard & Schmiedell.

(Testimony of Albert F. Leland)

Q. Are you acquainted with the defendant Paul J. Ziegler? A. Yes, sir.

Q. Are you acquainted with the defendant West Coast Supply Company? A. Yes, sir.

Q. Have you, prior to July 1, 1946, had any dealings with either the defendant Paul J. Ziegler or West Coast Supply Company? A. Yes, sir.

Q. Dealings in what nature?

A. Well, dealings in our general brokerage business and on sugar.

Q. Are you sugar brokers?

A. Well, general brokers. We are sugar brokers and molasses and many other items.

Q. Did you sometime in July of 1946 receive an order from either or both of the defendants in this case for the purchase or rather sale by you of 600,000 pounds of sugar? A. Yes, sir.

Q. About when was that? A. About July 1st.

Q. Will you state which of the defendants, which individuals, you talked to on that occasion, who was present and where the conversation took place? [94]

A. I talked to Mr. Paul Ziegler, and the conversation took place at the West Coast Supply Company's office.

Q. How did you happen to be there?

A. Well, earlier that day I received a wire from the head of my sugar company, the Union Sugar Company, quoting a Mr. James H. Marshall to the effect that sugar—

Mr. Carr: Well, just a moment. I object to any quoting of any third party.

The Court: Sustained.

Mr. Strong: If your Honor please, may I be heard?

(Testimony of Albert F. Leland)

The Court: I do not believe it is proper to have a conversation with some third party that was not in the presence of these defendants.

Mr. Strong: This is a wire which he read to the defendant. It goes to willfulness.

The Court: If you connect that up, of course it is admissible.

Q. By Mr. Strong: Is this something that you told or read to the defendant? A. Yes, sir.

Q. Which defendant? A. Mr. Paul Ziegler.

Q. Continue.

A. I read the wire to Mr. Ziegler—

The Court: You had better show it to counsel for the [95] defendant and mark it for identification so counsel will know what you are examining about.

The Clerk: Government's Exhibit 11 for identification.

(The document referred to was marked Government's Exhibit No. 11 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 11 and ask you whether this is the wire which you were just discussing?

A. Yes, sir. That is a copy of the original wire I read on July 1st to Mr. Paul Ziegler.

Mr. Strong: I offer that in evidence, your Honor.

Mr. Carr: Well, I should like to have some foundation. You are supposed to offer the original.

The Court: Lay your foundation.

Q. By Mr. Strong: Will you read this wire to yourself and state whether these are the words which you read to the defendant on that occasion?

(Testimony of Kenneth E. Pool)

A. (Examining document.) These are the words I read to the defendant, sir.

Q. By examining that document has your recollection been refreshed as to those words?

A. Yes, sir.

Q. Will you please state what you read to the defendant?

Mr. Carr: The telegram shows that.

The Court: The telegram speaks for itself. You may read [96] it. Read it into the record, counsel.

The Witness: This is a telegram sent to the Union Sugar Company forwarded to us as sugar brokers, as follows:

“PENDING FURTHER ACTION BY CONGRESS ON PRICE CONTROL REQUEST THAT ALL PROCESSORS REFINERS AND IMPORTERS CONTINUE SELLING AT PRICES IN EFFECT JUNE 30. COMMODITY COMMITMENTS UNDER OUTSTANDING CONTRACTS AND PROGRAMS WILL FURNISH BASIS FOR CONTINUING OPERATIONS UNTIL FURTHER SITUATION IS CLARIFIED. CONGRESS HAS AUTHORIZED COMMODITY CREDIT TO CONTINUE ITS 1946 SUGAR PROGRAM AND HAS SHOWN WILLINGNESS AUTHORIZE 1947 SUGAR PROGRAM. WILL APPRECIATE REPLY BY TELEGRAM AS TO YOUR POLICY. IN VIEW EXTENSION SECOND WAR POWERS ACT RATIONING AND ALLOCATING SUGAR AND MOLASSES CONTINUE IN EFFECT UNCHANGED.

“SIGNED BY JAMES H. MARSHALL, DIRECTOR.”

(Testimony of Albert F. Leland)

The Court: What is the date of that?

The Witness: July 1st.

The Court: Approximately when did you read it to the defendant?

The Witness: Sometime between 10:00 in the morning and noon.

The Court: What date?

The Witness: On July 1st.

Mr. Carr: I am going to move to strike that, not being [97] binding at all on the defendant, even if read to him.

It does not go to show intent because what some third party may think of whether the OPA was still in effect or not is not binding on this defendant.

Mr. Strong: If your Honor please, there is not any question of anything binding on the defendant involved in this telegram. The question is whether this defendant acted willfully. I think that every bit of evidence which tends to show that he knew what he was doing is evidence which is in support of the term "willfully" in the statute.

The Court: I think it goes more to the weight of the testimony rather than to the admissibility.

For that reason I shall deny the motion to strike. I believe under the new rules all have exceptions to the ruling.

Mr. Carr: That is right, your Honor.

The Court: So we do not have to note it in the record. If there is any error about it, I shall allow exceptions to all my rulings to both sides.

Mr. Strong: That is in evidence, your Honor?

The Court: Yes.

The Clerk: Government's Exhibit 11 in evidence.

(Testimony of Albert F. Leland)

Mr. Carr: Well, now, I did not understand that the telegram was in evidence. I understood that his testimony is in the record without the telegram.

The Court: It is more convenient, I suppose, for counsel [98] to have it in the record as an exhibit if further proceedings should be taken, Mr. Carr.

Mr. Carr: That is true, your Honor, it is more convenient.

Mr. Strong: I will withdraw it, your Honor.

Mr. Carr: I hate to waive so many of these fundamental rules.

The Court: The Government is willing to withdraw it; so it is withdrawn.

Mr. Strong: As I understand, the reading of the telegram stands?

The Court: It is in the record.

Q. By Mr. Strong: Did you on that same occasion have any discussion with the defendant Paul Ziegler regarding the purchase of 600,000 pounds of sugar?

A. Yes, sir.

The Court: How long will this witness take, counsel?

Mr. Strong: Well, I think he will finish within the next five minutes.

The Court: All right. But we have cross examination, too.

Mr. Strong: May I proceed?

The Court: Yes.

Q. By Mr. Strong: Will you state what that conversation was?

A. Well, Mr. Ziegler said if I would come over, he would [99] give me a check for 6,000 bags of sugar to be delivered. So in the afternoon I went over and picked

(Testimony of Albert F. Leland)

up the sugar check and took orders for delivery of approximately 2,800 bags that afternoon. Then there was to be a balance stored at the Union Sugar Company in Betteravia under our regular storage arrangement. I picked up the sugar check, turned it into my office, to my secretary, and ordered out the sugar for the West Coast Supply Company. And that sugar was delivered and that was then paid for, and that was the transaction.

Mr. Carr: Just a moment. Your Honor, I think he is making a statement that may be on the surface a conclusion, and I object to this traveling over the whole field there.

The Court: Yes.

Mr. Strong: May we strike his answer? And we will start again.

The Court: Yes. I think counsel is right. It may be proper, but we do not know.

Q. By Mr. Strong: All I want to know is the conversation you had with Mr. Ziegler after you read the telegram to him.

Did you have any conversation with him as to any order for sugar? A. Yes.

Q. Will you state what he said and what you said on that occasion? [100]

A. Mr. Ziegler said he would give me an order for 6,000 bags of sugar. I thanked him for it, and he told me that I could pick up the check in the afternoon, which I did.

Q. Just a minute. Was that the end of the conversation in the morning? A. Yes.

Q. Will you state how many pounds each bag of sugar is? A. 100 pounds.

(Testimony of Albert F. Leland)

Q. That was all there was to that conversation?

A. Yes, sir.

Q. Did you come back that afternoon?

A. I went to Mr. Ziegler's office that afternoon to pick up the ration check.

Q. Which Mr. Ziegler? A. Mr. Paul Ziegler.

Q. I show you Government's Exhibit No. 6 for identification and ask you if you ever saw this document before? A. Yes, sir.

Q. Will you state when and where you saw it?

A. I saw it in Mr. Paul Ziegler's office the afternoon of July 1st.

Q. Is that the check that he gave you?

A. Yes, sir.

Q. What did you do with it?

A. Turned it into my office for forwarding to San [101] Francisco.

Q. Will you look at that check and state whether it appears now on its face the same as it did when you got it from Mr. Paul J. Ziegler, as far as you can recall?

A. I can recall that it did not have "West Coast Supply Co." on it.

Q. That is the typed portion? A. Yes, sir.

Q. Did it have the rest? A. Yes, sir.

Q. Did you insert the words "West Coast Supply Co."? A. No, sir.

Q. Do you know who did? A. I do not, sir.

Q. Did you subsequently make out any orders or forms of orders or invoices in connection with the purchase of the 600,000 pounds of sugar?

A. I didn't personally. My office did.

(Testimony of Albert F. Leland)

Q. You ordered them made out?

A. Yes, sir.

Q. Who made them out? A. Miss Damon.

Mr. Carr: Your Honor, I think I can save time on this next item, if counsel will permit me to interrupt.

Mr. Strong: Yes, surely. [102]

Mr. Carr: May I interrogate the witness just one or two questions?

The Court: Yes.

Voir Dire Examination.

By Mr. Carr:

Q. I understand that these are photostats of records—these are the original records of your company, is that right? A. Yes, sir.

Q. And kept in the ordinary course of business?

A. Yes, sir. This is a duplicate of the original copy.

Q. Can you tell that they are accurate? Do you know if they are accurate? If they are, why, we won't raise any question as to the foundation.

If Mr. Strong will make the statement, your Honor, that those are copies of actual records of that concern kept in the ordinary course of business, I shall raise no objection to them insofar as the foundation is concerned.

Mr. Strong: I will so state.

The Court: Is that your recollection?

The Witness: I would state to the best of my knowledge that they are correct, sir.

The Court: All right. The stipulation will be approved.

Mr. Carr: Those are just the shipments of sugar, is that right? [103]

(Testimony of Albert F. Leland)

Mr. Strong: These documents constitute the papers which go to completing the shipment of 600,000 pounds of sugar which was ordered through this witness for the West Coast Supply Company.

Mr. Carr: I raise no question as to the foundation.

The Court: All right. In evidence. The stipulation will be approved.

The Clerk: That will be Government's Exhibit 12 in evidence.

(The document referred to was marked as Government's Exhibit No. 12 and introduced into evidence.)

Mr. Carr: Counsel states to me he has photostatic copies here of the freight bills and delivery receipts from the Union Terminal Warehouse. And I want to say in open court that I understand, Mr. Small, those are the same that I looked at.

Mr. Strong: The name is "Strong." They are the same as you looked at and are photostatic copies of the originals.

Mr. Carr: If he states as counsel in this case that these photostatic copies were taken and they were kept in the regular course of business of these two concerns, I won't require the witness to lay the foundation.

Mr. Strong: I have the originals in court and have the witnesses for examination.

The Court: The stipulation will be approved. [104]

Mr. Carr: I am merely stipulating to eliminate the calling of witnesses.

The Clerk: Government's Exhibit 13 in evidence.

The Court: 12 are the invoices?

Mr. Carr: 12 are the invoices.

(Testimony of Albert F. Leland)

The Court: 12 are the instruments now before the clerk.

Mr. Strong: 13 has the freight bills and station records showing transfer of sugar.

Mr. Carr: Freight bills, and what do you call them?

Mr. Strong: Freight bills and station records. 14 are delivery receipts showing delivery of the sugar to the West Coast Supply Company.

The Clerk: These are Exhibits 12, 13 and 14 in evidence, respectively.

Mr. Carr: Have they gone into evidence? No, I didn't understand so.

The Court: I shall permit any objection you have.

Mr. Carr: Well, your Honor, my objection is simply this: that on the testimony now disclosed by the witness he has testified that the West Coast Supply Company is not on that check, and this makes these documents wholly irrelevant, not admissible.

Mr. Strong: I submit to your Honor that is wholly immaterial whether the name "West Coast Supply Company" is or is not on the check. The Government charges that these checks [105] were issued or caused to be issued by and on behalf of this company, and whether they are complete in a technical sense from a negotiable instrument standpoint or not is entirely immaterial.

If the defendants, or either of them, by their action caused somebody else to insert that name, they are just as liable for that insertion as though they did it themselves. There is no requirement, as a matter of fact, that we show that "West Coast Supply Company" was on there or was not on there.

(Testimony of Albert F. Leland)

These people that received these checks received them in connection with the purchase of sugar from the West Coast Supply Company for the delivery of sugar to the West Coast Supply Company, and they are certainly documents which were ration documents which in this case were handed by one of the defendants to the person on the stand to cover that particular purchase of 600,000 pounds which was delivered to the West Coast Supply Company.

Mr. Carr: Your Honor, I want to be sure that I do not leave anything undone. I think I ought to take this opportunity to point out that in the very ration order which these defendants allay you find some definitions. You find on the last page, your Honor, section 24.1, "definitions," "check," paragraph (5):

"'Check' means a sugar ration check, in the form pre-[106] scribed by the Office of Price Administration, drawn by a depositor. . ."

If it was not drawn by the West Coast Supply Company, it was not drawn by the depositor.

". . . drawn by a depositor against his account and made payable to the account of a named person."

That is the specific definition.

Let me just read you one or two other definitions:

"'Depositor' means a person who has a ration bank account. . ."

The only testimony here is that the West Coast Supply Company had a ration account, not Ziegler.

"A person shall be deemed a separate depositor with respect to each of his accounts."

Now, turning over to the next page and getting to section (15) of the Ration Order, the word "Issue."

(Testimony of Albert F. Leland)

“‘Issue’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.”

I submit that the testimony here is there was no West Coast name on the check. There is no evidence that Ziegler has an account. The check was not completed when it was issued. It is not a check within the meaning of the Ration Order.

Mr. Strong: I submit, your Honor, that if that is all [107] true, then we are now witnessing a very simple device for obtaining sugar without ration currency.

Mr. Carr: That isn't the charge. Just a moment. He is not charged here, your Honor, with using any device for obtaining sugar.

There are specific charges in this case. We are here to meet those charges, not some other charges.

The Court: I think it is a matter of argument, gentlemen, for this reason: That is testimony here which shows that there was no objection made to the bank when they were advised of the withdrawal of sugar rationing against the account. I think that would be a matter of argument by the defense and by the Government as to whatever interpretation they desire on it.

I will overrule the objection.

Mr. Strong: As I understand, these three documents—12, 13 and 14—are now in evidence?

The Court: In evidence, subject to the objection of Mr. Carr.

(The documents referred to were marked Government's Exhibits Nos. 12, 13 and 14 and were introduced in evidence.)

(Testimony of Albert F. Leland)

Mr. Strong: May I have that statement read? I did not hear you.

(Record read by the reporter.)

Mr. Carr: Are you speaking with reference to 12, 13 and [108] 14?

The Court: 12, 13 and 14.

Mr. Strong: Your Honor, I see it is nearly 5:00 o'clock. I do not think the cross examination will be finished by 5:00.

The Court: That is what I was fearful of when I made the suggestion a few minutes ago.

Ladies and gentlemen of the jury, remember the admonition I have heretofore given you. Do not discuss this matter among yourselves and do not permit anyone to discuss it with you. Do not discuss the merits of the controversy until it is finally submitted to you under the instructions of the court.

We will take a recess until 10:00 o'clock tomorrow morning.

Mr. Carr: May we have the witnesses brought back and instructed to return? Or may I say that to them on your behalf.

The Court: I think they will return if you express that for the court.

Mr. Carr: Thank you.

(Whereupon, at 5:00 o'clock p. m. an adjournment was taken until 10:00 o'clock a. m., February 5, 1947.)

Los Angeles, California, Wednesday, February 5, 1947,
10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106 Criminal,
United States against West Coast Supply Company, a
partnership, and Paul J. Ziegler, for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defendants.

The Court: Stipulate the jury is present?

Mr. Carr: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

The Court: You may proceed.

Mr. Strong: Your Honor, may I at this time, before
I put the witness back on the stand, call another witness
who is ill at this time?

The Court: You may proceed.

Mr. Strong: Mr. Pool.

KENNETH E. POOL,

called as a witness by the Government, being first duly
sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Kenneth E. Pool, P-o-o-l. [110]

Mr. Strong: I think there are two witnesses in the
court room, your Honor. I believe they should be ex-
cluded.

The Court: Are there any witnesses testifying on
either side of this case in the court room? The bailiff
will show you where you may retire to. And the bailiff
will excuse you.

(Testimony of Kenneth E. Pool)

Mr. Carr: You don't need to excuse Mr. Leland who was on the stand.

The Court: He has testified already.

Mr. Carr: We don't insist on his leaving.

The Court: You may remain, then.

Direct Examination.

By Mr. Strong:

Q. What is your occupation?

A. I am employed by the State Department of Public Health, bureau of Food and Drug Section as an inspector.

Q. How long have you had that job?

A. Since January the 29th, 1936. That is 11 years.

Q. In your capacity which you have just described have you ever had occasion to deal with the defendant Paul J. Ziegler?

A. I have.

Q. Did you ever discuss with Mr. Paul J. Ziegler what his capacity is in the West Coast Supply Company?

A. Yes, sir, I have, on several occasions. [111]

Q. When was the first time that you discussed it with him?

A. September 13, 1943.

Q. Was that in connection with a proceeding of any kind?

A. That was in connection with an inspection made of the factory at that time and the subsequent destruction of some nut meats that were contaminated with filth.

Q. What factory was that?

The Court: I think that—

The Witness: West Coast Supply Company.

Mr. Carr: May I inquire, what is the purpose of this testimony?

(Testimony of Kenneth E. Pool)

The Court: I do not suppose that counsel on either side could be asked to disclose.

Mr. Carr: I will object, wholly collateral, collateral issues. It is raising issues that are not involved in the indictment, and it is working solely for the prejudice of this defendant to bring up something about some complaint or something to do with some food and drug or health department matter.

The Court: That part of it may be stricken out. But your request that he disclose at this time what the witness is going to testify to will be denied.

The other matter will be stricken out. [112]

Mr. Strong: We are not interested in the other matters, your Honor.

The Court: All right, it is stricken out. The jury is instructed to disregard it.

Q. By Mr. Strong: Who was present at the time of that discussion with the defendant Paul J. Ziegler?

A. Who was present besides Mr. Ziegler, you say?

Q. Yes, and you. A. No one else.

Q. Where did it take place?

A. It took place on the premises of the West Coast Supply Company at, I think it is, 1252 Long Beach Boulevard. I can give you the exact address here. 1654 Long Beach Boulevard.

Q. With reference to Mr. Ziegler's capacity in the West Coast Supply Company, will you state what you said and what he said?

Mr. Carr: I object to that as being far beyond the time this crime charged here is in 1946. He has related a conversation back in 1943. I object to it as being wholly without the issue of the case, premature and—

(Testimony of Kenneth E. Pool)

The Court: I will sustain that objection. This is 1943. We are not interested in what the relation was in 1943.

Mr. Strong: Your Honor, may I submit if we establish a relation once existing, I believe that there is a presumption [113] that it continues.

The Court: Not in a criminal case.

Q. By Mr. Strong: Did you have conversation—

The Court: There is no presumption against a defendant in a criminal case.

Mr. Strong: Not a presumption against a defendant but a presumption of continuing fact.

The Court: That would be against him, counsel. I will sustain the objection.

Q. By Mr. Strong: Did you have any conversations with the defendant at any more recent date regarding the status of the West Coast Supply Company?

A. January the 11th, 1944, was the next occasion.

Q. What was the last occasion?

A. The last one in March 13, 1945.

Mr. Strong: I submit, your Honor, I wanted to ask the same question as to that date.

The Court: March, 1945?

Mr. Carr: The same objection, your Honor.

The Court: No, I shall permit that. That is near enough to the period here.

Mr. Carr: May I further object on the ground that you cannot prove a partnership by any act or declaration of an agent.

The Court: How would you prove it? [114]

Mr. Carr: Well, your Honor, if you want the authorities—

(Testimony of Kenneth E. Pool)

The Court: How would you prove it? Here are two men that formed a partnership. Now, an agency cannot be proved by an agent's statement or declaration. But if a man formed a partnership or owned the property, he can state it.

Mr. Carr: He has offered to prove, as I understand the testimony, the partnership relation. You cannot prove the partnership relation by the act or declaration of someone who is supposed to act in behalf of the partnership.

The Court: One partner, then, cannot say he is a partner?

Mr. Carr: If he is on the stand, yes, he can testify. But you cannot take his act or declaration and prove that he is a partner by that act or declaration. That is exactly what counsel is trying to do.

The Court: How would you prove it? Suppose two men say, "We are partners," and make that statement to you? And you say, "Well, they have told me they are partners."

How would you prove it? There is no way to prove it.

Mr. Carr: Yes, your Honor, you can prove it. For instance, in a civil case you can call one of the partners.

The Court: That will not prove it.

Mr. Carr: In a criminal case—

The Court: Now, wait. That would not prove it because you say that the declaration of one partner is not sufficient; so if he is on the stand, that would not prove it. [115]

Mr. Carr: That is a different proposition. If he is on the stand, he can testify.

The Court: Not under your statement.

(Testimony of Kenneth E. Pool)

Mr. Carr: Of course he can.

The Court: Of course he cannot because it is assumed that—of course, it does not have the dignity of an oath—that men speak the truth.

Mr. Carr: I submit my objection is, your Honor, that you cannot offer testimony of an act or declaration of Mr. Ziegler to bind the West Coast Supply Company. That is my objection.

The Court: The objection is there is no way to prove a partner in a criminal case. It will be overruled.

Q. By Mr. Strong: Will you state the conversation on that date, just with reference to what I asked?

A. March 13, 1945?

Q. Yes. A. At that time—

Mr. Strong: May I have that stricken, your Honor? I would like to lay a clearer time foundation.

The Court: All right.

Q. By Mr. Strong: Where did this take place?

A. This took place in the same premises referred to as 1654 Long Beach Boulevard in the City of Los Angeles, the West Coast Supply Company. [116]

Q. Who was present besides you and Mr. Ziegler?

A. Just myself and Mr. Ziegler at that particular time. Sometime later on there was someone else.

Q. Just at that time.

A. Just at this time, that is right.

Q. Will you now state what was said?

A. Mr. Raymond Ziegler—you don't want any other part of the conversation here, do you? Just as to the partnership?

(Testimony of Kenneth E. Pool)

Q. Yes.

A. He stated that he was a partner, owner-partner of the West Coast Supply Company.

Q. Talking about Mr. Paul Ziegler?

A. Mr. Paul Ziegler, yes.

Q. Who stated it? A. Mr. Paul Ziegler.

Q. How did that conversation arise?

A. It occurred over the sanitary conditions in the plant.

Mr. Strong: Just a minute.

The Court: Strike that out.

Q. By Mr. Strong: Just a minute. Had you asked him or—

A. Yes, I had asked him who owned the firm. He said that it was still a partnership of Paul Ziegler, Raymond [117] Ziegler and Allan Ziegler.

Mr. Strong: That is all.

Cross Examination.

By Mr. Carr:

Q. He did not mention his father to you?

A. I beg your pardon, sir?

Q. He did not mention his father?

A. No, I don't think he did at that time.

Q. How long have you been in contact with the West Coast Supply Company in your so-called official capacity?

A. Oh, three or four years, maybe a little longer.

Q. Did you ever meet Mr. John Ziegler?

(Testimony of Kenneth E. Pool)

A. John Ziegler? No, I don't recall any John Ziegler. I know someone by that name but no connection with the West Coast.

Q. You did not know that Mr. John Ziegler was a member of the West Coast Supply Company?

Mr. Strong: I object to that, your Honor. That is a fact not in evidence.

The Court: This is cross examination. Counsel is entitled to go into all those questions.

Mr. Strong: I withdraw it.

The Court: Repeat counsel's question.

(Question read by the reporter.) [118]

The Witness: No.

Q. By Mr. Carr: How many conversations do you say you had with Mr. Paul Ziegler?

A. How many conversations have I had with him?

Q. Yes. A. On one occasion or the other?

Q. Approximately. A. Oh, five or six.

Q. Each time you talked about the partnership, did you? A. No, not on each occasion.

Q. How many times did you discuss the partnership relation? A. Three.

Q. Three different times? A. That is right.

Mr. Carr: That is all.

The Court: That is all.

Mr. Carr: May I just ask one further question? I am sorry, your Honor.

(Testimony of Kenneth E. Pool)

The Court: Just a minute, Mr. Pool. You may stand right there.

Q. By Mr. Carr: What is the registration you have, what firm name? A. West Coast Supply Company.

Q. What other registration do you have? [119]

A. In my records here?

Q. Yes. A. None.

Mr. Carr: Maybe he had better take the stand, your Honor.

The Court: All right, take the stand.

The Witness: That is all: West Coast Supply Company.

Q. By Mr. Carr: Do you list the partners there?

A. Yes.

Q. In your file? A. Yes, that is right.

Q. Who do you list as partners?

A. Paul Ziegler, J. H. Ziegler—

Q. J. H. Ziegler? A. J. H. Ziegler.

Q. That is John Ziegler, is it not?

A. I don't know.

Q. All right. Who else?

A. R. M. Ziegler, A. S. Ziegler.

Mr. Carr: That is all.

Mr. Strong: That is all.

The Court: That is all.

(Witness excused.)

ALBERT F. LELAND (Recalled)

Direct Examination (Resumed)

By Mr. Strong: [120]

Q. You are the same Mr. Leland who testified here yesterday? A. Yes, sir.

Q. After receiving, as you testified, the order for the sugar from Mr. Paul Ziegler what did you do?

A. Phoned the sugar refinery, Union Sugar Company, and gave them instructions to deliver it.

Q. Did you have invoices made out?

A. Well, the office had invoices made out, yes, sir.

Q. Did you supply any of the information contained on the invoices?

A. No. That is all a matter of sugar record.

Q. Well, here showing you Government's Exhibit 12, did you supply your office with any of the information on that?

A. Yes. I told them to ship to West Coast Supply Company.

Q. Who had ordered the sugar to be shipped to the West Coast Supply Company? Anyone?

A. Mr. Ziegler.

Q. That is, Paul J. Ziegler?

A. Paul J. Ziegler, yes, sir.

Q. Now, then, as I recall you testified that you received a sugar ration check from Mr. Paul J. Ziegler?

A. Yes, sir.

Q. Was that in connection with this transaction or [121] another one? A. This transaction.

(Testimony of Albert F. Leland)

Q. You stated, I believe, that Government's Exhibit 6 for identification was the check which he gave you?

A. Yes, sir.

Mr. Strong: I offer this check in evidence, your Honor, as Government's Exhibit 6.

Mr. Carr: I object on the ground that it has been altered. The testimony shows it has been altered. It is not binding on either the West Coast Supply Company or on Paul J. Ziegler; for the further reason that under the ration order, Third Revised Ration Order No. 3, it is not a check issued under paragraph (15) of section 24.1, also under paragraph (5), section 24.1, and paragraph (9) of section 24.1, all because, your Honor, first of all, it is not a ration check; it is not on an account, not drawn by a depositor on a ration account. It is wholly immaterial, collateral to all of the issues in this case.

The Court: The check reads "Ration Check—The United States of America—Office of Price Administration—Transfer to the sugar ration bank account of Union Sugar Co.—600,000 pounds of sugar."

With reference to the alteration, Mr. Carr, will you direct the court's attention to what you claim is an alteration? [122]

Mr. Carr: I direct the court's attention to the fact that the witness has testified that the name "West Coast Supply Company" did not appear there at the time he received the check. Someone after delivering the check has altered the check by adding to it "West Coast Supply Company."

(Testimony of Albert F. Leland)

The ration order specifically prevents the transfer of a check after it is altered. May I refer your Honor to section 15.7, Revised Ration Order No. 3, which reads as follows:

"No check which has been altered . . . mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check . . ."

To-wit, this gentleman or his concern.

". . . shall return it to the issuer with a request for a new check. . ."

And so on down to paragraph (h). I had better read the whole paragraph.

"(h) How altered and lost checks replaced. A depositor to whom an altered . . . mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement . . . may issue a new check. If he does so. . ."

Then it goes on to say what he must do to cancel it.

Now, very specifically under everyone of those definitions and regulations the check could not be passed. It was an [123] altered check. If you add a name to a check, you alter it.

Mr. Strong: May I be heard on that, your Honor?

The Court: Yes.

Mr. Strong: May I use those regulations, please, Mr. Carr?

Mr. Carr: I suppose so.

(Testimony of Albert F. Leland)

Mr. Strong: Thank you. The provisions which Mr. Carr read, in effect, make it illegal for Mailliard & Schmiedell to handle the check as they did, possibly. But the mere fact that someone else may have committed a violation does not absolve anyone else who committed a violation.

In this particular instance, your Honor, the check, as the witness testified, was given to him by this defendant as the sugar ration check covering the purchase of 600,000 pounds of sugar which these documents which are in evidence, Government's Exhibits 12, 13 and 14, indicate.

Mr. Carr: I don't believe they were in evidence. May I interrupt? Were they in evidence?

Mr. Strong: By stipulation.

Mr. Carr: I will have to assign that as error, your Honor. I did not stipulate that those documents could go in evidence. I stipulated that no foundation was required and that in the ordinary course of business they were kept as records. But I specifically objected to them on other grounds. [124]

I do not think counsel ought to mis-state that.

Mr. Strong: My impression was that your Honor admitted them in evidence and that they are so marked.

The Court: Well, that is not Mr. Carr's point. The point is to have the record show what the stipulation was and save his objection.

Mr. Strong: Yes. But I believe your Honor admitted them over the objection.

(Testimony of Albert F. Leland)

Mr. Carr: That may be true. I don't know. I did not so understand.

The Court: We will have the record show as to protect the defendant's rights.

Mr. Strong: I have no objection to that, your Honor.

Mr. Carr: If they are offered, may I be sure that that objection applies?

The Court: Yes, that objection applies to Exhibits 12, 13 and 14. They are in evidence. All right, proceed, Mr. Strong.

Mr. Strong: As I was saying, your Honor, the sugar as shown by these documents, was actually transferred to the West Coast Supply Company and received by it, so that there is not any question of that fact that this particular check, which is being questioned now, was specifically handed to this witness as the ration check to cover this transaction, this sugar transaction. [125]

I submit to your Honor that under those circumstances it does not make any difference whether the defendant Paul J. Ziegler did or did not place the name "West Coast Supply Company" upon the check, since that check, regardless of whether it had that name, was, in fact, the ration check being used by the defendant, as was testified here, to cover the particular transaction which was an order given by him for sugar to be delivered to the West Coast Supply Company and which sugar was actually so delivered.

(Testimony of Albert F. Leland)

Under those circumstances I do not think it makes any difference as to when that name "West Coast Supply Company" got there, even assuming it was not there when the defendant Paul J. Ziegler handed over the check, since the intent and purpose of that check and the substance of the entire transaction here was to obtain sugar which could be obtained only with the use of a ration check, and this was the ration check that was handed over.

If the defendant or anyone else failed to insert on that check certain material, which the law requires should be present, that does not absolve him from having used a ration check upon an account in which there was not sufficient credit to cover the check, assuming that he knew it, which I will show later.

However, the fact is that he himself is using this check for this purpose and, consequently, that check ought to be [126] admitted in evidence since that is the basis of the transaction and the basis of the action of the sugar dealer here in actually transferring the sugar.

The Court: I will withdraw my ruling on it for the present.

Mr. Carr: I want to add one objection, your Honor, I failed to add.

The Court: All right.

Mr. Carr: That is, there has been no proof whatsoever to connect or to show the authority or the knowledge of the partnership to authorize whoever it was to place that name on the check.

(Testimony of Albert F. Leland)

I object to it on that further ground.

The Court: That objection goes, then, particularly to the partnership?

Mr. Carr: Yes, your Honor.

The Court: Yes. That is a good objection as to the partnership.

Mr. Strong: In that respect, we have the testimony of the last witness who testified that this defendant said he was a partner in the partnership, and we have an authorization card which shows that he is one of the authorized signatures. I think that that check would be a good check, regardless of whether it has a partnership relation between the defendants or not and since he did an unauthorized act, since the act [127] prohibits anyone from doing that.

The Court: You have not established any of the signatures on Exhibit 2.

Mr. Strong: Oh, no, I have not established any of the signatures. But I have established, I believe, through the first witness that the account ledger sheets were sent to the West Coast Supply Company covering all the transactions being carried on pursuant to the signatures on this card and that those transactions were never complained of; that the account was credited and debited as shown. There was never any objection on the part of any of the partners or anybody to the transactions being carried out pursuant to this card.

(Testimony of Albert F. Leland)

The Court: I will withhold my ruling for the present.
Proceed, counsel.

Q. By Mr. Strong: What did you do with the check after you got it? A. Turned it in to the office.

Q. To whom did you give it?

A. Miss Damon, my secretary.

Q. Who? A. Miss Damon, my secretary.

Mr. Strong: May I have that check, your Honor?
Thank you.

Q. By Mr. Strong: That is Government's Exhibit No. 6 for identification? [128] A. Yes, sir.

Q. That is the last you saw of it? A. Yes, sir.

Mr. Strong: That is all.

Cross Examination.

By Mr. Carr:

Q. Mr. Leland, you have known Paul Ziegler for some time, have you not? A. Yes, sir.

Q. Done business with him over a period of years?

A. Yes, sir.

Q. How long would you say?

A. I would say approximately three years.

Q. Did you know Mr. Ziegler when he was practicing law? A. No, sir.

Q. Do you recall about what time it was he came down and started to be around the West Coast Supply Company?

A. I don't recall accurately. I think it was either 1942 or '43.

(Testimony of Albert F. Leland)

Q. Prior to July 1, 1946, you had had several conversations with Mr. Ziegler respecting the possibility of getting sugar, had you not? A. Yes, sir. [129]

Q. Is it not a fact, Mr. Leland, that Mr. Ziegler had told you along about, oh, the latter part of June that he rather expected the OPA to die out and not be renewed and if that happened he wanted you to be in a position to get him some sugar? A. Yes, sir.

Q. And you discussed with him on two or three occasions at least the possibility that should that event occur, should the Act not be renewed, that you could get substantial amounts of sugar for him?

A. Yes, sir, we had sugar to sell.

Q. Do you recall the Price Control Act, or the Act, terminated on June 30, 1946? A. The OPA?

Q. Yes. A. Yes.

Q. Did Mr. Ziegler call you on that day about the possibility of getting sugar?

A. I don't recall that he did that day, sir.

Q. But he did call you the first thing on July 1st, the day after the Act terminated? A. Yes, sir.

Q. And asked you how much sugar you could get?

A. Yes, sir.

Q. So ultimately it ended up that you got him 6,000 [130] bags?

A. No, sir. I read him the telegram I had received stating that—I can't remember the exact phraseology of it without seeing the wire again—stating that the sugar

(Testimony of Albert F. Leland)

rationing was still in effect as notified by the Union Sugar Company.

Q. Is it not a fact at that time that Mr. Ziegler said to you that he was not bound by what that telegram said; that it was his opinion and he believed that the OPA was out of existence?

A. Yes, I believe he did. But I said I was bound by the telegram.

Q. In other words, you felt that because of orders from your concern that you ought to get some kind of ration document? A. Yes, sir.

Q. But Mr. Ziegler took the position that there was no OPA, did he not? A. I presume that he did sir.

Q. Well, he told you that, didn't he? A. Yes.

Q. When he gave you this check it was after you and he had discussed the matter of whether or not the OPA was still in existence?

A. Well, we discussed that in the morning. [131]

Q. This transaction occurred on July 1st?

A. Yes, sir.

Q. What time of the morning would you say that was?

A. Well, I would say it was probably around between 10:00 and 11:30 sometime.

Q. Mr. Leland, do you recall Mr. Ziegler in that conversation saying to you that the telegram was inconsistent on its face because the Act was terminating, the Price Control Act was terminating, and if it was ter-

(Testimony of Albert F. Leland)

minating the OPA could not continue to exist? Do you recall his saying that?

A. I don't remember just what he said. I remember that he questioned the telegram.

Mr. Carr: That is all.

Redirect Examination.

By Mr. Strong:

Q. After he questioned the telegram you insisted that you had to have a ration check? A. Yes.

Q. And after he questioned the telegram you got an order for 600,000 pounds of sugar? A. Yes.

Q. For the West Coast Supply Company?

A. Yes.

Q. When you insisted upon a check Mr. Ziegler gave you a ration check? [132]

A. No. It wasn't any insisting. He said, "Come over and get the check in the afternoon," which I did, sir.

Q. That is the check which is Government's Exhibit 6 for identification? A. Yes.

Mr. Strong: Thank you. That is all.

(Witness excused.)

Mr. Strong: Ask Miss Damon to come in.

At this time, your Honor, while we are waiting for the witness, I have talked to Mr. Carr about certain documents which I have here. I believe Mr. Carr will not object to the competency of the documents.

Mr. Carr: I am afraid I might. I wish we could get that straight, counsel, that I am stipulating to one thing only: that is, you do not have to call the witness to show that they have been kept in the ordinary course of business.

If Mr. Strong will just state to the court that these records were obtained from the particular people, that they were kept in the ordinary course of business, I will not require any foundation. But I may want to object to them on other grounds.

Mr. Strong: I will so state, your Honor.

Mr. Carr: Very well.

The Court: You so stipulate.

Mr. Strong: I would like to have those four documents [133] marked for identification.

The Clerk: Government's Exhibit 15 for identification.

(The documents referred to were marked Government's Exhibit 15 for identification.)

Mr. Carr: Will you tell us what they are?

Mr. Strong: Yes, I will in a moment.

Mr. Carr: Just the name of them.

Mr. Strong: May I have these marked for identification? Government's Exhibit 15 for identification consisting of the following four documents:

One is a warehouse delivery advice, No. 31450, covering three hundred bags, 100 pounds each, of sugar.

The second document is a copy of the same document with a stamp upon it "delivered"—

The Court: Is that 16, or what?

Mr. Strong: Beg pardon, sir?

The Court: Would that be 16 for identification?

Mr. Strong: This is all 15. They are all four of them in one group.

The Court: Then you will have to identify them as A, B, and so forth to keep them straight.

Mr. Strong: Very well.

The Court: Mr. Cross.

The Clerk: Yes, your Honor.

(The documents referred to were marked Government's Exhibits Nos. 15-A, B, C and D for identification.) [134]

Mr. Carr: We might be able to save trouble, your Honor, in that regard by just referring to them—what are they? Delivery evidence?

Mr. Strong: These are the documents which show the shipment and delivery of sugar involved in—

Mr. Carr: I don't raise any objection on that feature. It is just entirely up to your Honor.

Mr. Strong: That is involved in Count 4, your Honor. I offer these four documents in evidence.

Mr. Carr: I will object to those on the ground—this is the first time I have made this objection—that a partnership cannot commit a crime.

Mr. Strong: Under the Second War Powers Act a partnership is specifically designated as a person, within the meaning of the word "person," who are prohibited from engaging in the acts set forth and whose act constitute crimes under that law.

If your Honor desires, I can read the section to you.

The Court: No. Overruled. Exception allowed.

Mr. Carr: I might state to the court that I have about 10 or 15 cases as to partnerships.

The Court: That was argued to me for about two hours, and you argued one case, as you will remember—

Mr. Carr: That was a corporation, your Honor.

The Court: There was a partnership involved. [135]

Mr. Carr: I don't think so. I still don't think a partnership can commit a crime.

Mr. Strong: Has your Honor ruled on Government's Exhibits 15-A through -D?

The Court: Yes.

The Clerk: 15 in evidence.

(The document referred to was marked Government's Exhibit No. 15 and introduced in evidence.)

The Clerk: The next group is Government's Exhibit 16 for identification.

Mr. Strong: I will make the same statement, your Honor, as to Government's Exhibit 16 for identification, 17 for identification, 18 for identification, 19 for identification and 20 for identification.

These are all originals and photostatic copies of documents showing the transfer of sugar, as indicated on the face of these documents, to the West Coast Supply Company. These are offered now in evidence in connection with Count 6, your Honor.

Mr. Carr: Is that 16 and 17?

Mr. Strong: 16, 17, 18, 19, and 20.

Mr. Carr: Objected to on the same ground as heretofore. On the further ground that they do not prove or help to prove any offense. Further at this time I object on the ground that no offense is charged in any count of the information. [136]

The Court: Overruled. In evidence.

The Clerk: That will be Government's Exhibits 16, 17, 18, 19 and 20 in evidence.

(The documents referred to were marked Government's Exhibits Nos. 16, 17, 18, 19 and 20 and introduced in evidence.)

Mr. Strong: Then, your Honor, I have two documents showing the transfer of sugar to the West Coast Supply Company in the amount of 800,000 pounds.

I make the same statement as to those documents. These are being offered now in support of Count 8, your Honor.

Mr. Carr: The same objection as I have heretofore stated on all grounds, your Honor.

The Court: It is so understood. Overruled.

The Clerk: Government's Exhibit 21 in evidence.

(The documents referred to were marked Government's Exhibit No. 21 and introduced in evidence.)

Mr. Strong: That is 80,000 pounds, your Honor, not 800,000 pounds.

The Court: Has this witness been sworn, Mr. Cross?

The Clerk: No, your Honor.

DOROTHY ANITA DAMON,

a witness called by the Government, being first duly sworn, was examined and testified as follows: [137]

The Clerk: Your full name?

The Witness: Dorothy Anita Damon.

The Clerk: Your last name is spelled how?

The Witness: D-a-m-o-n.

Mr. Strong: I think, your Honor, it may save time if I simply withdraw this witness and dispense with her testimony. I have no use for her in view of these documents here.

The Court: I think you had better identify the witness while she is here.

Mr. Strong: Yes.

Direct Examination.

By Mr. Strong:

Q. What is your occupation?

A. I am a secretary. I work for Mailliard & Schmiedell. I am Mr. Leland's secretary.

Q. Is that the gentleman who was here as a witness?

A. Yes.

Mr. Strong: I shall ask her one or two other questions.

The Court: What is the name of the firm?

The Witness: Mailliard & Schmiedell.

Q. By Mr. Strong: I show you Government's Exhibit 12 in evidence and ask you if you ever saw these documents before?

A. They are my invoices on sugar we delivered to West Coast Supply. [138]

(Testimony of Dorothy Anita Damon)

Q. You mean you prepared those physically?

A. Not the invoice itself. I wrote up the bills and figured them, and they were turned over to the biller and she typed them.

Q. I see. A. I got them in the mail.

Q. You were the one who got the information from Mr. Leland? A. Yes.

Mr. Strong: That is all.

Mr. Carr: That is all.

The Court: That is all, thank you.

(Witness excused.)

Mr. Strong: Your Honor, if I may have 10 minutes, I may dispose of a large number of witnesses, both for the sake of the court and the jury and for the sake of the witnesses.

The Court: Ladies and gentlemen of the jury, we will take the morning recess.

You will remember the admonition I have heretofore given you. You are not to discuss the matter among yourselves or to permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

(Brief recess.) [139]

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulate.

Mr. Carr: So stipulate.

The Court: Proceed.

Mr. Strong: Mr. Barry.

JAMES R. BARRY,

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: James R. Barry, B-a-r-r-y.

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Barry?

A. A food broker.

Q. Are you a sugar broker, too?

A. Yes, sugar along with allied lines.

Q. Do you work for anybody?

A. Yes, I work for Parrott & Company.

Q. What is your occupation there?

A. Co-manager of the Los Angeles office. [140]

Q. Have you held that job during the year 1946?

A. Yes.

Q. And July, 1946? A. Yes.

Q. Do you know the defendant, Paul J. Ziegler, in this case? A. I do.

Q. Have you sold any sugar to Mr. Ziegler during 1946? A. I have.

Q. Directing your attention specifically to July 1, 1946, will you state whether you had any contact with Paul J. Ziegler with reference to any sugar on that date?

A. On or around that date I did.

Q. Did Mr. Ziegler make any purchase of sugar or place any orders for sugar with you on or about July 1, 1946? A. He did.

Q. Was that face to face or how?

A. We have a lot of orders placed with us, and I would think that possibly—

(Testimony of James R. Barry)

The Court: No, no. Just listen to the question. Laymen seldom understand the procedure in court. We can only have just what the witness knows of his own knowledge and not what he thinks or what he supposes.

Repeat the question now, please.

(Question read by the reporter.) [141]

Q. By Mr. Strong: Give us your best recollection.

A. By telephone.

Q. Have you had occasion to speak with Paul J. Ziegler over the telephone prior to this time?

A. I have.

Q. Are you familiar with Paul J. Ziegler's voice?

Mr. Carr: We won't raise any question about the identification of voice.

The Court: That will be understood. Proceed, counsel.

Q. By Mr. Strong: Will you state whether Mr. Ziegler ordered any sugar on that date?

A. He did.

Q. Approximately how much?

A. To the best of my recollection, there was two orders. One was some 600 bags and another was some 6,000 bags.

Q. 6,000 bags? A. Yes.

Q. How many pounds is that that was ordered on that date?

A. I have a hard time—a bag is a hundred pounds. So that would be 600,000 pounds.

Q. Altogether it was how many pounds?

A. Well, that would be 660,000 pounds.

Q. Will you state what he said to you, as far as you can remember, in placing the order? [142]

(Testimony of James R. Barry)

A. He gave us an order for sugar to ship 600 bags by truck, the rest by car.

Q. Did you place any orders with any sugar companies for that sugar? A. Yes.

Q. Did you make any records of the transaction?

A. Our office did.

Q. Who would that be?

A. That would be my secretary: Miss Barry.

Q. You gave her the information as to what Mr. Ziegler told you?

A. I am stating from memory only.

Q. Yes. That is what we want. A. Yes.

Q. I show you Government's Exhibit No. 4 for identification and ask you whether you ever saw this document before? A. Yes, I have.

Q. When was that?

A. July 1st or July 2nd of '46.

Q. Where did you see it? A. In my office.

Q. How did you get it? A. By mail.

Q. Was that document used by you in connection with the purchase of sugar by Mr. Ziegler? [143]

A. That document is, in a sense, the final confirmation of the order.

Q. That is a ration check covering the sugar?

A. That is a ration check covering the purchase of the sugar.

Q. The purchase on the previous day or the same day?

A. The same or previous day.

Q. In other words, that is the check, ration check, covering the 660,000 pounds of which you have just spoken? A. Correct.

(Testimony of James R. Barry)

Q. Would you look at that document and state whether the document, as received by you, appears the same as it is now on the face of it? A. Yes.

Q. So far as you know, the sugar was shipped out as per your order? A. Yes.

Mr. Strong: That is all.

Cross Examination

By Mr. Carr:

Q. Mr. Barry, you were out of the city on July 1st, weren't you? A. I can't answer that question.

Q. Do you have any records or any way of finding out [144] whether you were out of the city on that day?

A. I possibly could investigate it, yes.

Q. To refresh your recollection, were you not out of town on July 1st and the following day, July 2nd? Your secretary told you that she had attended to this order.

A. That is possible. I would have to check my records.

Q. As a matter of fact, you did not pick up that check at all, did you?

A. What do you mean by "pick up"?

Q. Go over—

The Court: No. He said it came through the mail.

The Witness: It came through the mail, I believe.

Q. By Mr. Carr: Did you open the letter yourself?

A. I very seldom do; so I possibly did not.

Q. I will ask you if you did not call Mr. Ziegler on July the 2nd or maybe the day after and say in effect, "Paul, I notice this check has only 'Paul J. Ziegler' on it. It doesn't have 'West Coast Supply Company' on it."

(Testimony of James R. Barry)

Do you remember that conversation?

A. I don't remember it, but it could have been true.

Q. Well, have you any way of refreshing your recollection? A. No.

Q. Now, take another look at this check. Is it not a fact that the name "West Coast Supply Co." was not on the check when you first saw it? [145]

A. That is something I can't answer.

Q. Do you remember whether it was or it wasn't on there? A. I do not remember.

Q. Do you still have the same typewriters in your office that you had on July the 2nd?

A. I imagine we do, yes. I am sure we do.

Q. Do you know? A. We do.

Q. Are those typewriters available now so if we wanted to make a sample we could get a sample of those typewriters? A. They are available.

Q. Do you have a diary? Do you keep a diary?

A. No, I do not.

Q. Do you remember having a conversation with Mr. Ziegler on the telephone on July the 2nd?

A. I remember several conversations with Mr. Ziegler. As far as the date is concerned—

Q. Do you remember talking about the check?

A. It is possible.

Q. Well, I am just asking you.

A. I do not remember.

Q. Mr. Ziegler talked to you sometime in June about getting sugar, did he not; discussed with you the possibility that the OPA might not be renewed and he wanted to look around and pick up some sugar for his manufacturing business?

(Testimony of James R. Barry)

A. It is perfectly possible. I can't answer a direct [146] question as to a month. That is our business, the sugar business. They are talking to us every day about that possibility. All our customers are.

Q. Well, you do remember that you had several conversations with Mr. Ziegler? You remember that?

A. I have had many conversations with Mr. Ziegler.

Q. You do recall, I think, that on July the 1st you talked to him on the telephone about the sale of this sugar?

A. You have shaken my confidence in my memory. You say I wasn't in Los Angeles; so I can't answer that question.

Q. I did not say that, Mr. Witness. I merely asked you.

I am not allowed, the court will tell you, to argue with the witness. But what I want to get is your best recollection, and whatever means you have of establishing that recollection I would like to have you do it.

Can you go back to your office and get out your order slips or any documents and refresh your recollection?

A. No.

Q. Are you sure that you looked at this check?

A. I don't like to—

The Court: Exhibit what, Mr. Carr?

Mr. Carr: This is Exhibit 4.

The Witness: Mr. Carr, could I explain the method of operation in our office? Maybe that—

Mr. Carr: Certainly. [147]

The Witness: Then I can possibly—I don't like to answer with reservations or anything like that. But on the handling of the Holly sugar account in our office, or—

(Testimony of James R. Barry)

ders as a general rule come in on the telephone or through the mail; and as a general rule those orders are placed with myself or with my sister who is also my secretary.

Now; as far as the conversation that might have occurred on a certain date with a certain customer, my recollection would not be positive as to whether the conversation was with my secretary and transmitted to me or whether it was with me directly. And that is why I am not able to answer on such a day whether I personally spoke to Mr. Ziegler. I could say that our office records show that someone in our office talked to him.

Q. Take another look at Exhibit 4 and tell me if you recall whether you ever saw that check or not?

A. To the best of my knowledge, I have seen this check before.

The Court: Does the date on the check help you any? Is there a date?

The Witness: Yes, there is a date, your Honor: July 1st, '46.

Q. By Mr. Carr: Mr. Barry, in an attempt to refresh your recollection, do you not recall that on July 2nd or 3rd—you don't have to be specific; I realize the memory might [148] slip on that—but about that time that you called up Mr. Ziegler because the name "West Coast Supply Co." did not appear on that check and discussed with him why he had not put "West Coast Supply Co." on the check?

A. Without answering your question, first at times we receive checks in our office without having properly the names in.

The Court: Listen to Mr. Carr's question now.

The Witness: All right.

(Testimony of James R. Barry)

The Court: And then take your time. There is no hurry. Get it as accurately as you can.

Read the question.

(Question read by the reporter.)

The Witness: Yes.

Mr. Carr: That is all.

Redirect Examination

By Mr. Strong:

Q. Will you give us the substance of that discussion?

A. I questioned Mr. Ziegler why the check did not have "West Coast Supply Co.," and to the best of my recollection he said, "Well, is that necessary?" Or, "That is not necessary." And I said, "Well, we will send the check back to be properly filled out or we will insert the firm name on the check," as is our practice when firms fail to type in their [149] name on their ration evidence.

To the best of my knowledge, we did not send this check back to West Coast Supply to be filled in but that Mr. Paul Ziegler authorized us by—

The Court: Strike out the word "authorize." Just state what he said.

The Witness: All right. Paul Ziegler said, "All right, put in 'West Coast Supply Co.'"

Mr. Strong: That is all.

Recross Examination

By Mr. Carr:

Q. Well, now, let us go back and refresh your recollection.

It is beginning to come back to you now, Mr. Barry, that transaction? A. Yes.

(Testimony of James R. Barry)

Q. You say Mr. Ziegler said to you to put "West Coast Supply Co." on that check?

A. He said in substance to put it in. Now, by "substance" I mean he probably said, "If you insist, if you won't ship the sugar unless you do."

Q. Well, now, let me refresh your recollection if this isn't what he said to you: "You do as you like about it. As far as I am concerned, there is no OPA in existence. The [150] Act has run out." And he called you by your first name, I believe, Jim, or whatever it is?

A. That is generally the case.

Q. "That is up to you. Do whatever you want to do about it"? A. No, I do not recall that.

Q. You don't recall specifically what he did say to you? A. I recall that he authorized—

The Court: No. In the law that is a conclusion.

The Witness: Sorry, your Honor.

The Court: You do not have to give the exact words at any time. It is nearly impossible for any person to do that in a conversation. Just give the substance—think it over carefully—the best you can with reference to the conversation. All right.

The Witness: He said, "If you won't accept the check without West Coast Supply Company's name on the check, put it on."

Q. By Mr. Carr: You made no contact with any member of West Coast Supply Company to determine whether or not he had that authority, did you, or that ability to tell you to do that?

A. Your question is not clear, Mr. Carr.

The Court: Repeat the question. [151]

(Testimony of James R. Barry)

Mr. Carr: If it is not, I will strike it and ask it again.

The Court: All right.

Q. By Mr. Carr: Did you call up anyone at the West Coast Supply Company to determine whether or not you should put that name on: "West Coast Supply Co."?

A. No, I did not.

Q. Who put it on there?

A. I imagine my secretary.

Q. But the name "West Coast Supply Co." was put in by your typewriter by someone in your organization?

A. To the best of my recollection, because I do not recall sending the check back to the West Coast Supply Company.

Q. Well, at the time that you talked to Mr. Ziegler, part of that sugar had already been shipped, had it not?

A. I would have to look at the records.

Q. Do you have them available?

A. They are in the possession of my secretary who follows me on the stand.

Mr. Carr: May I ask, your Honor, that he get those records?

The Court: Yes, that is a proper request.

The Witness: Do I go get them?

Mr. Carr: Yes, if you will, please.

(Brief pause in the proceedings.) [152]

Q. By Mr. Carr: Can you tell from those records, whatever records you may have, to refresh your recollection from anything, if it is a fact that some of that sugar was shipped prior to the time that whoever it was in your organization put the West Coast Supply Company name on that check?

(Testimony of James R. Barry)

Mr. Strong: I submit, your Honor, that that is wholly immaterial.

The Court: I shall permit it. It is cross examination. He is entitled to wide latitude.

Mr. Strong: All right. I withdraw it.

Q. By Mr. Carr: Do you understand my question?

A. Would you repeat it, please?

The Court: Mr. Reporter, read the question.

(Question read by the reporter.)

Q. By Mr. Carr: Is that not clear, Mr. Witness?

A. That is clear.

The Court: That is clear?

The Witness: From my records there was no sugar delivered to West Coast Supply Company until their name was on the check.

Q. By Mr. Carr: Was it shipped?

A. Our records aren't clear enough to answer that. The only person—

Q. Will your secretary know that, do you think?

A. Not from our records, no. [153]

Q. Then you have no way of establishing whether or not it was shipped, some of it, prior to that date?

A. I have no way of establishing what day it might have been shipped.

Q. Did your secretary handle generally the ration checks that came to your organization?

A. That is the common practice.

Q. What approved the acceptance of the ration checks, in other words, to consummate the transaction? Did you or your secretary?

A. That is not clear. By "approval" what do you mean?

(Testimony of James R. Barry)

Q. Ordinarily before you would deliver sugar you would ask for a ration check, would you not?

A. Correct.

Q. Now, you delivered sugar sometimes and got the ration check later, did you not?

A. Not to my knowledge.

Q. You never did that? A. No, sir.

Q. So that you waited until you actually got physical possession of the ration check before you wrote out any order for shipment of sugar?

A. That is our policy.

Q. Is that what you did?

A. To the best of my recollection, yes. [154]

Q. At the time this check arrived you noticed that it didn't have "West Coast Supply Co." on it?

A. Either I did or someone in our office did.

Q. So either you or—I believe you remember now that you did call up Mr. Ziegler?

A. To the best of my memory, I did talk to Paul on that.

Q. You did that because you knew that on the check you had to have a depositor under the Ration Order; you would have to have a depositor on that check, did you not; signed by a depositor?

A. We sell sugar only to authorized firms, if that is what you mean.

Q. I mean simply this: that when you got a ration check if there was not an authorized depositor and an account somewhere, you would not take the check, would you? A. We would not.

(Testimony of James R. Barry)

Q. So you merely put this name "West Coast Supply Co." in to protect yourself, did you not?

A. No, sir.

Mr. Carr: That is all.

Redirect Examination.

By Mr. Strong:

Q. Do you have the sugar here in Los Angeles for ship- [155] ment?

A. No. I believe all of this sugar—we have sugar in Los Angeles, but most of it comes from the factory at Dyer, California, which is the same as Santa Ana.

Q. Where did this come from?

A. Santa Ana, all from the Dyer factory of the Holly Sugar Corporation.

Q. So that you don't actually yourself ship any sugar here, do you?

A. Our firm does not ship sugar.

Q. You are brokers? A. We are brokers, yes.

Q. Now, in answer to a question by Mr. Carr as to whether you spoke to anybody else at the West Coast Supply Company to find out whether you were authorized to insert that name "West Coast Supply Co.," you said you did not?

A. To the best of my knowledge, I did not.

Q. Why not?

A. It was not at all necessary from my viewpoint.

Mr. Carr: Well, now, I move to strike that answer.

The Court: Yes. "Not necessary" is a conclusion.

Q. By Mr. Strong: Had you been dealing with Paul Ziegler before? A. Yes, for sometime.

Q. Had he been buying sugar from you before? [156]

A. Yes.

(Testimony of James R. Barry)

Q. For whose account had he been buying sugar?

A. The West Coast Supply Company.

Q. Did you ever have any complaint from the West Coast Supply Company as to selling sugar to Paul?

A. No, sir.

Mr. Strong: That is all.

Recross Examination.

By Mr. Carr:

Q. I would like to ask another question now.

You knew that the John H. Ziegler Company was also operating at that same location, did you not?

A. Your Honor, may I ask a question?

The Court: Yes, go ahead.

The Witness: Anything that the attorney asks me about is as far as my knowledge refers back to my knowledge as of the date under consideration: July 1, 1946?

The Court: No, no.

The Witness: Or my knowledge?

The Court: No, counsel has not limited his question. He just asked you a general question.

Repeat the question, please.

(Question read by the reporter.)

Mr. Strong: I object to that unless a date is fixed as [157] to when he knew this.

The Court: I shall permit the question.

Mr. Carr: July 1, 1946.

The Witness: I do not know.

Q. By Mr. Carr: When did you know?

A. Possibly November, October of 1946.

Q. Who paid you for the sugar?

A. We do not receive payment for the sugar.

(Testimony of James R. Barry)

Q. You got a receipt there, a copy of a receipt that you signed for the checks for the sugar, I mean money checks?

A. The only checks we received were from the Union Bank and Trust Company, cashier's checks. We received them on behalf of the Holly Sugar Corporation who the money was due as their agents.

Q. Your records will certainly show who paid for the sugar, will they not?

A. On the invoices where we collected the money on behalf of the Holly Sugar Corporation, they were paid by cashier checks.

Q. Did you not receive two checks from the John H. Ziegler Company? A. No, sir.

Q. You are sure of that?

A. Mr. Carr, we do not receive checks from any people we sell sugar to. The Holly Sugar Corporation receives pay- [158] ment for their sugar. We are their agents and sell the sugar.

Q. Don't the checks go through you, Mr. Barry?

A. In general practice, no.

Q. Did not these checks to pay for the sugar go through you?

A. A part of the sugar. Two checks went through our office.

Q. Those were from the John H. Ziegler Company, were they not?

A. To the best of my knowledge of our records, they came from cashier check No. 493719 of the Union Bank and Trust Company.

(Testimony of James R. Barry)

Q. You have identified that check. Identify the other two, if you will. A. Well, that is one of two.

Q. Yes.

A. There is only one other that I can identify. It is cashier's check No. 493858 of the Union Bank and Trust Company.

Mr. Carr: Very well. That is all.

Redirect Examination

By Mr. Strong:

Q. You did not receive those checks personally, did you? You are just testifying from the records? [159]

A. To the best of my knowledge, those checks, one or both, were brought into our office; and if I did not receive them personally, I believe that I saw them.

Q. Now, just one more question. You say that in November you found out about a John H. Ziegler Company? A. Approximately.

Q. Who told you about it?

A. I believe Al Ziegler.

Q. Al Ziegler? A. Either Al or Ray.

Q. What did he tell you?

Mr. Carr: Well, now, just a moment. I object to any conversation as to what occurred.

The Court: Oh, no. You opened it up, Mr. Carr.

Mr. Carr: All right, your Honor. I object to it.

The Court: Yes. When you bring up a subject, they are entitled to—

(Testimony of James R. Barry)

Mr. Carr: There is a limitation, your Honor, on the subject.

The Court: What?

Mr. Carr: Very well, sir. I have made my objection.

The Court: Go ahead.

The Witness: Well, I believe the matter came up when it became public knowledge that this court action might take place, and at that time I was at West Coast Supply and I [160] believe either Ray or Al Ziegler in ordinary conversation said, "Well, Paul is with John H. Ziegler Company."

Mr. Strong: That is all.

The Witness: And to the best of my knowledge, that is the first time I heard of John H. Ziegler Company.

Mr. Strong: That is all.

Recross Examination.

By Mr. Carr:

Q. You learned then that there were two partnerships operating at 1654 Long Beach Avenue?

A. Mr. Carr, there was no detail. It was an ordinary conversation. I do not know that today.

Q. And Allan Ziegler told you that Paul was not even a partner of the West Coast Supply Company, did he not?

A. To the best of my knowledge, he did not go that far, no.

Mr. Carr: That is all.

(Testimony of James R. Barry)

Redirect Examination.

By Mr. Strong:

Q. All the sugar purchases that you had had heretofore were for that company?

A. West Coast Supply Company.

Mr. Strong: That is all. [161]

The Court: That is all, thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Strong: Mr. Moseley.

I would like to offer at this time Government's Exhibit 4 for identification in evidence, your Honor. That is the check that the witness just testified about for six hundred sixty- —

Mr. Carr: I want to object to it on all grounds that I have heretofore set forth. In addition to the other grounds I want to add that a partnership cannot be guilty of a criminal offense and furthermore that there has been an alteration of the check; that it is not a ration document within those various sections that I have heretofore pointed out to your Honor and has not been shown to be any authority whatsoever for the signature or name "West Coast Supply Co." to be on the check.

The Court: In evidence.

The Clerk: Government's Exhibit No. 4 in evidence.

(The document referred to was marked Government's Exhibit No. 4 and introduced in evidence.)

[GOVERNMENT'S EXHIBIT NO. 4]

UNITED STATES GOVERNMENT

CHECK NO. 146

TRANSFER TO THE

SUGAR

RATION BANK ACCOUNT OF

Holly Sugar Co.
(NAME OF BENEF.)
Five Hundred Fifty Thousand
(AMOUNT IN WORDS)

TO THE

UNION BANK & TRUST CO.

OF LOS ANGELES
COMMERCIAL TRUST

FR-121

LOS ANGELES, CAL.

16.77

West Coast Supply Co.

(PRINT OR TYPE NAME OF YOUR ACCOUNT)

Charles J. Egan
(AUTHORIZED SIGNATURE)

DATE

7/1 1946

AMOUNT IN FIGURES

660,000

POUNDS OF

SUGAR

FED. DEPT.
FIRST NATIONAL BANK
Colorado Springs, Colorado
HOLLY SUGAR CORPORATION
Colorado Springs, Colorado

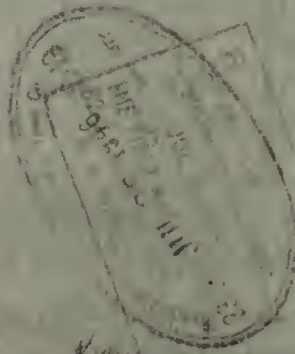
CO. No. 191064

7/4/47

44

trans

11555



*4000
JAN 20 1947
THE
Caf. Reg. Com.*

(Brief pause in the proceedings.)

Mr. Strong: Miss Barry. [162]

CATHERINE BARRY,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Catherine Barry.

The Clerk: How do you spell "Catherine"?

The Witness: C-a-t-h-e-r-i-n-e.

The Clerk: Will you take the stand, please?

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Miss Barry?

A. Stenographer.

Q. Whom do you work for?

A. Parrott & Company.

Q. Are you related to Mr. Barry?

A. I am his sister.

Q. Are you his stenographer? A. Yes.

Q. Now, did you bring certain records which I asked for? A. Yes.

Q. May I see them, please?

A. Surely. (Producing documents.)

Mr. Strong: Thank you. May I have this marked for [163] identification, if your Honor please?

The Court: Very well.

The Clerk: That will be Government's Exhibit 22 for identification.

(The documents referred to were marked Government's Exhibit No. 22 for identification.)

(Testimony of Catherine Barry)

Mr. Strong: May I have these four documents marked as Government's Exhibit for identification, your Honor?

The Court: They may be marked.

The Clerk: Government's Exhibit 23 for identification.

(The documents referred to were marked Government's Exhibit No. 23 for identification.)

Q. By Mr. Strong: Miss Barry, you are acquainted with the order—

The Court: Will you just state the subject of Exhibit 22 so I can have a note of it?

Mr. Strong: Yes, your Honor. Government's Exhibit 22 is a handwritten sheet showing various entries, names of concerns and details of transactions.

The Court: All right.

Mr. Strong: Government's Exhibit 23 consists of four separate invoices, rather, copies. They are labeled "Broker's copy of invoice—Holly Sugar Corporation."

Q. By Mr. Strong: Are you familiar with the transaction in which the West Coast Supply Company purchased sugar [164] on or about July 1, 1946, through your brokerage firm? A. Yes.

Q. I show you Government's Exhibit No. 22 for identification and ask you what this is with reference to that transaction.

A. Well, this is a record of shipments of sugar. We call it a "Daily Sheet" in the office. It shows a shipment of 600 bags, 300 on July 1st and 300 on July 2nd and a shipment of 6,000 bags that were shipped in rail cars.

(Testimony of Catherine Barry)

Q. Shipment to whom?

A. To West Coast Supply Company.

Q. By the way, is that your handwriting?

A. Yes, it is.

Q. You made out that entire sheet?

A. Yes. Well, let me see.

Q. At least that is as to West Coast Supply Company?

A. As to West Coast, yes.

Q. Does it show the ration check covering that transaction?
A. Yes, 146.

Q. I show you Government's Exhibit 23 for identification and ask you what this is.

Mr. Carr: Mr. Strong, you did not show me those documents.

Mr. Strong: I am sorry. That was absolutely unintentional. [165] al. May I show them to you?

(Brief pause in the proceedings.)

Mr. Carr: All right, thank you.

Q. By Mr. Strong: I believe I asked you to state if you know what Government's Exhibit 23 for identification is.
A. They are copies of invoices.

Q. Invoices covering any particular transaction?

A. Covering the two transactions I spoke of: the 600 bags and 6,000—

Q. That totals how much sugar?

A. 6,600 bags.

Q. How much is each bag? A. 100 pounds.

Q. So far as you know, that sugar was ordered by you from the Holly Sugar Corporation for delivery to West Coast Supply Company?
A. Yes.

Mr. Strong: May I offer these in evidence, your Honor, as Government's Exhibit 23?

(Testimony of Catherine Barry)

The Court: In evidence.

The Clerk: Government's Exhibit 23 into evidence.

(The documents referred to were marked Government's Exhibit No. 23 and introduced in evidence.)

Mr. Strong: And Government's Exhibit 22, insofar as it applies to the West Coast Supply Company? [166]

The Court: In evidence.

Mr. Carr: I would like to reserve that objection, if I may, your Honor, that so far as the West Coast Supply Company is concerned it is not binding on them in a criminal case.

The Court: It is so understood.

The Clerk: Government's Exhibit 22 in evidence.

(The documents referred to were marked as Government's Exhibit No. 22 and introduced in evidence.)

Mr. Strong: That is all.

Cross Examination.

By Mr. Carr:

Q. I show you Government's Exhibit No. 4 in evidence and ask you: Are you the one that put in "West Coast Supply Co." there, typed it in?

A. Typed it in?

Q. Yes.

A. Well, it is a long time to remember back to say whether I did or did not. I have added the firm name to checks when they have been missing. I could have done it to this. I think I probably did. If I did, I asked the firm or at least somebody I thought was the firm whether I could add "West Coast Supply Co."

(Testimony of Catherine Barry)

Q. I believe you testified, too, that there were two [167] shipments on July 1st. Do you want that record to refer to? I am showing you Government's Exhibit 22 in evidence.

I did not quite hear you plainly. As I understood, you said there were some shipments on July 1st?

A. On July 1st there were 300 bags that moved by truck, and on July 2nd 300 by truck; and the rail cars were shipped—

Q. Later on sometime?

A. The 3rd and the 5th.

Q. The shipment of sugar took place before you received the check, did it not? A. No.

Q. Did you get the check on July 1st?

A. Oh, I presume so.

Q. Well, did you not receive it in the mail on July 2nd?

A. I don't know whether it came in in the mail or whether it was brought into the office. They come in both ways. I can't remember whether they come in by mail or—

Q. Well, it is your practice sometimes to ship the sugar before you get the ration check, is it not?

A. Sometimes.

Mr. Carr: That is all. [168]

Redirect Examination.

By Mr. Strong:

Q. Now, on that Government Exhibit 22 the details of the order, as I understand it, that is what we are discussing here.

I see that there is on here the letters "CH" and then there is a number sign and "146": "CH #146."

(Testimony of Catherine Barry)

Can you say what that is? A. Check 146.

Q. Where did you get that information?

A. That is the procedure I follow when I have sent the check in a day or so earlier with the first invoice. You have to have the ration credit attached to the first invoice. I have filed "Holly," meaning that that check has already gone in to Holly Sugar Corporation and they carry the ration credit for further shipments of sugar until the check is used up.

Mr. Strong: Thank you very much. That is all.

Recross Examination.

By Mr. Carr:

Q. Did I understand you to say—what was that date again, please, that shows the receipt of the check or when you delivered it?

A. We delivered on the 1st.

Q. No, I mean the ration check. [169]

A. It was attached to the invoice covering the delivery of the first.

Q. So that you sent the check over to your principal on July 1st?

A. No, I wouldn't have invoiced until possibly July 2nd or July 3rd. You have to wait for the papers to come through until you pick up the invoice.

Q. Well, the point I am trying to get at is simply this: that you cannot tell from that document when you received the ration check, can you?

A. No, I cannot.

Mr. Carr: I think that is all. Just one moment.

(Brief pause in the proceedings.)

(Testimony of Catherine Barry)

Q. By Mr. Carr: Miss Barry, you attended to the transactions on July 1st between you and Mr. Ziegler in connection with this sugar, did you not?

A. I was in the office.

Q. Do you remember Mr. Barry was out of the city on that date?

A. No, I don't remember that he was.

Q. Do you recall that you attended to the details of the transaction yourself because Mr. Barry was out of the city?

A. I could have. I don't remember in this particular transaction. I do that. That is my customary procedure.

Q. Had you talked to Mr. Ziegler previous to this time, previous to, say, July 2nd? [170]

A. Had I ever talked to him?

Q. Yes.

A. Over the telephone lots of times.

Q. He had discussed with you, had he not, prior to July 1st and, I would say, approximately along in June, the possibility of obtaining sugar if the OPA was not continued?

A. I don't understand quite what you mean.

Q. Do you remember that the renewal of the Price Administration Act was up in Congress at that time?

A. Yes.

Q. And was under consideration? A. Yes.

Q. And it terminated on June 29th? A. Yes.

Q. Now, what I am asking you, if you don't recollect that Mr. Ziegler had talked to you on occasions about the possibility of obtaining sugar if that Act was not renewed?

A. I could have. I mean many of the customers wondered whether they would obtain sugar.

(Testimony of Catherine Barry)

Mr. Carr: That is all.

The Witness: I mean I don't remember particularly Mr. Ziegler's case.

Mr. Carr: That is all.

Mr. Strong: Just one question, if I may, your Honor, which I forgot to ask on direct. [171]

The Court: All right.

Redirect Examination.

By Mr. Strong:

Q. Did you ever discuss with Mr. Paul Ziegler what his capacity was in the West Coast Supply Company?

A. No.

Mr. Strong: That is all.

The Court: That is all, thank you.

(Witness excused.)

Mr. Strong: May I suggest a recess at this time, your Honor?

The Court: Do you have a short witness or not?

Mr. Strong: No, it is not a short one. He will probably take about 20 minutes.

The Court: Ladies and gentlemen, remember the admonition I have heretofore given you not to discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not form or express any opinion concerning the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will take a recess until 2:00 o'clock.

(Whereupon, at 11:50 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [172]

Los Angeles, California, Wednesday, February 5, 1947,
2:00 P. M.

The Court: Mr. Cross, call the case.

The Clerk: Yes, your Honor. 19,106 Criminal,
United States against West Coast Supply Company and
also Paul J. Ziegler for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defendants.

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Carr: So stipulated.

Mr. Strong: So stipulated.

The Court: You may proceed.

Mr. Strong: Mr. Moseley.

CARL F. MOSELEY,

a witness called by the Government, being first duly
sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Carl F. Moseley.

The Clerk: C-a-r-l?

The Witness: Yes.

The Clerk: Will you take the stand, please? [173]

The Witness: M-o-s-e-l-e-y.

Direct Examination.

By Mr. Strong:

Q. Mr. Moseley, what is your occupation?

A. I am a salesman for the Kelley-Clarke Company.

(Testimony of Carl F. Moseley)

Q. Were you at any time during 1946 employed by the Sims-Thompson Company of Los Angeles?

A. Yes.

Q. When were you so employed?

A. All during the year until September the 15th.

The Court: What company was that?

The Witness: Sims-Thompson.

Q. By Mr. Strong: What was your capacity there?

A. Sales.

Q. What did you sell? A. Sugar.

Q. Is that a brokerage firm? A. Yes.

Q. Did you on or about July 1, 1946, have occasion to talk to the defendant Paul Ziegler?

A. On what day?

Q. About July 1, 1946. A. Yes.

Q. Did you talk to him face to face or over the phone?
[174] A. Over the phone.

Q. Had you talked to Mr. Ziegler before over the phone?

Mr. Carr: We will stipulate that he knows Mr. Ziegler's voice.

Mr. Strong: All right.

Q. Did you at that time receive an order for sugar from Mr. Ziegler? A. Yes.

Q. Approximately how many pounds was ordered?

A. 80,000 pounds.

Q. Was that ordered in the name of a company?

A. Yes.

Q. What company? A. West Coast Supply.

Q. What did you do with the order when you got it?

(Testimony of Carl F. Moseley)

A. I turned it over to the order department.

Q. That is at Sims-Thompson Company?

A. Yes, sir.

Q. Did you have any discussion with Mr. Ziegler about a ration check? A. No.

Q. Did you ever receive any ration check from Mr. Ziegler?

A. Well, at the time he placed the order he gave us a ration check number. [175]

Q. Do you remember what the number is?

A. No.

Q. Did you have any further conversation regarding that check? A. None at all.

Q. Have you ever seen the check itself?

A. Yes.

Q. I show you Government's exhibit 3 for identification and ask you if you ever saw this document before?

A. Yes.

Q. Where did you see it?

A. I saw it yesterday morning.

Q. Did you ever see it before then? A. No.

Q. Did you say that you received the check from Mr. Ziegler? A. No.

Q. Oh, I misunderstood you. I am sorry. You do not know whether a check arrived or not?

A. No. I would say—

Mr. Carr: Now, if he says no, if your Honor please—

The Court: All right.

Mr. Strong: That is all.

Mr. Carr: That is all.

The Court: That is all, thank you.

(Witness excused.) [176]

Mr. Strong: Mr. Neff.

The Court: Do you have any instructions to be filed, Mr. Strong?

Mr. Strong: I have them, your Honor.

(Documents handed to the court.)

Mr. Strong: May the record show that I have given a copy of the instructions to Mr. Carr?

The Court: And filed a copy with the court.

PAUL H. NEFF,

a witness called by the Government, having been duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Paul H. Neff.

The Clerk: N-e-f-f?

The Witness: Yes.

The Clerk: Take the stand, please.

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Neff?

A. Office manager.

Q. Of what?

A. For the Sims-Thompson Company.

Q. How long have you been office manager? [177]

A. Since October, 1944.

Q. Nineteen what? A. 44.

Q. Would you speak up a little louder?

A. Since October, 1944.

Q. Did you bring any documents which I subpoenaed from the files of the Sims-Thompson Company?

A. Yes, I did.

(Testimony of Paul H. Neff)

Q. May I see them? (Producing documents.)

Q. Thank you. Were you employed as office manager on July 1, 1946? A. Yes, sir.

Q. Did you have in your custody any of the records of the Sims-Thompson Company on that date?

A. Yes, sir.

Q. Did you have anything to do with the order for 80,000 pounds of sugar placed by the West Coast Supply Company on or about that date?

Mr. Carr: Just a moment. I am going to object. I have not objected up to now to these leading questions, but I am going to object on the ground that it is not only leading but it assumes something that is not in evidence.

The Court: Reframe the question.

Q. By Mr. Strong: What, if anything, did you do with [178] any orders of the West Coast Supply Company during 1946? A. On this particular order?

Q. Well, tell us in general first.

A. I didn't receive this particular order, but it came to my desk. It was given to me by Mr. Moseley.

Q. Mr. Moseley was employed at that time by Sims-Thompson Company? A. Yes, sir.

Q. What, if anything, did you do in connection with that order after you received it from Mr. Moseley?

A. I placed the order on the telephone for transmittal to San Francisco.

Q. Would you look among these paper which you have handed me and indicate where, if any, any of these documents are a copy of the teletype?

A. These are copies of the teletype.

The Court: Show it to defense counsel.

(Brief pause in the proceedings.)

(Testimony of Paul H. Neff)

Q. By Mr. Strong: Did you at the time you placed the order have in your possession a ration check covering the sugar called for by the order?

A. No, sir. We had the check number but not the ration check.

Mr. Strong: May I have these marked for identification, your Honor, two documents? [179]

Mr. Carr: We are unable to hear the witness.

The Court: Yes, speak up louder so that counsel may hear you.

The Clerk: Government's Exhibit 24 for identification

The Court: Consisting of two pages?

Mr. Strong: Two pages, your Honor. I don't know whether they are duplicates.

(The documents referred to were marked as Government's Exhibit No. 24 for identification.)

Q. By Mr. Strong: Are these two duplicates?

A. No, sir.

Q. What was the number of the ration check covering that order? A. 148.

Q. Did you at any time subsequent to that date receive the ration check itself?

A. I don't believe we received the ration check until after the order was teletyped. We had the ration number.

Q. Did you at any time after the order was teletyped receive the ration check itself? A. Yes, sir.

Q. Did you see the ration check when it arrived?

A. I don't recall this ration check in particular, but they all come across my desk.

(Testimony of Paul H. Neff)

Q. I show you what has been marked as Government's [180] Exhibit No. 3 for identification and ask you if you ever saw this check before?

A. I probably did. I don't remember the check in particular, but I see all of them.

Q. Do your records indicate when you received ration check 148? A. Yes, sir.

Q. Covering that?

A. The record shows the transmittal of the check to San Francisco on July 3rd.

Mr. Strong: May I have this marked for identification?

The Clerk: Government's Exhibit 25 for identification.

(The document referred to was marked Government's Exhibit No. 25 for identification.)

Q. By Mr. Strong: Do you have a pencil?

A. I have a pen.

Q. Would you mark or underscore here where it shows the receipt and the transmittal of the ration check?

Mr. Carr: I object to this as being hearsay.

The Court: You mean the records themselves are not kept in the regular order of business would not be admissible, Mr. Carr?

Mr. Carr: I think probably the records kept in the ordinary course of business would be admissible. He has testified to that, that he didn't know about receiving the [181] check. And now he is attempting to use the record to show it.

The Court: I think the objection would go to the foundation. You would have to lay a better foundation. The objection is good.

(Testimony of Paul H. Neff)

Q. By Mr. Strong: Did you prepare the original of this letter, Government's Exhibit 25 for identification?

A. I didn't prepare it personally, no.

Q. Was it prepared under your direction?

A. Yes, sir.

Q. Did you send the original of this letter?

A. Yes, sir.

Q. Did you examine the checks which are listed on this letter before you sent them?

A. I examine all checks.

Q. And you state that this shows what?

A. This letter?

Q. Yes.

A. It shows that the check was transmitted to San Francisco attached to the original of this letter.

Q. Do you now recall whether or not you transmitted this check, Government Exhibit No. 3 for identification, with this letter?

A. Yes, I must have. I can't remember every check that comes across my desk.

Mr. Carr: I move to strike that answer, your Honor. He [182] said, Yes, he must have. That is supposition.

Mr. Strong: I think it goes to the weight, your Honor.

The Court: It is not a very definite statement. I do not think the answer is objectionable, except it is so qualified that it is a question of the weight for the jury. I think "I must have" can go out, that part of it.

Mr. Carr: That is the part I mean, your Honor.

The Court: All right, it may go out.

Mr. Strong: May I have the answer read?

(Answer read by the reporter.)

(Testimony of Paul H. Neff)

Q. By Mr. Strong: Now, will you state what these other documents are with reference to this transaction?

A. This is a ledger sheet—

The Court: Now, wait. Have that marked for identification and show it to counsel first. Show it to counsel for the defense.

The Clerk: Government's Exhibit 26 for identification.

(The document referred to was marked Government's Exhibit No. 26 for identification.)

Mr. Strong: May we have the rest of them marked to save time, your Honor?

The Court: Yes.

The Clerk: As one exhibit?

Mr. Strong: No, separate exhibits.

The Court: As you mark them state, Mr. Cross, just what [183] they purport to be so that I may make a note of it.

The Clerk: Yes, your Honor.

The Court: Exhibit 27 purports to be what?

The Clerk: No. 27 for identification, your Honor, indicates that it contains entries that were shipped July 3rd to the Utah Wholesale Grocery and others and also to the West Coast Supply.

The Court: All right, that is 27.

The Clerk: 27 for identification. Government Exhibit 28 for identification is a broker's file copy of an invoice, No. 9,292. That is 28, your Honor. And Government's Exhibit 29 is a broker's file copy of invoice No. 9,291.

(Testimony of Paul H. Neff)

Government's Exhibit 30 for identification is a credit memorandum credited to the West Coast Supply Company, and that is dated August 13, 1946.

Government's Exhibit 31 for identification is a broker's file copy of invoice No. 9,292, dated September 9, 1946.

Government's Exhibit 32 for identification is a letter dated July 24, 1946, to Sims-Thompson Company from Allen Ziegler.

Government's Exhibit 33 for identification is a shipping order containing a broker's reference number 4,887.

Government's Exhibit 34 for identification is a shipping order containing a broker's reference number 4,886.

Government's Exhibit 35 for identification is a one-[184] sheet document of the West Coast Supply.

(The documents referred to were marked Government's Exhibits Nos. 27 to 35, inclusive for identification.)

Mr. Strong: Have you finished examining these documents?

Mr. Carr: For the moment.

Q. By Mr. Strong: I show you these documents, which are Government's Exhibits Nos. 25 to 35, inclusive, for identification and ask you whether these are part of the files of the company which you represent?

A. Yes, they are.

Q. Are they kept in the usual course of business by you or under your supervision?

A. Yes, sir.

Q. Now, these are documents relating to the transaction involving 80,000 pounds of sugar purchased by the West Coast Supply Company on July 1, 1946.

(Testimony of Paul H. Neff)

Mr. Carr: Objected to as outside the issue of this case. He keeps saying "sold to the West Coast Supply Company."

The Court: I think the question is unfortunately framed. You may ask him to whom it was shipped if you want to.

Q. By Mr. Strong: Are these the documents which show the transaction that took place on or about July 1, 1946, with reference to 80,000 pounds of sugar?

A. Yes, sir.

Q. Do your documents indicate to whom the sale and [185] shipment was made?

Mr. Carr: Objected to. The documents speak for themselves.

The Court: Yes, the documents will speak for themselves, counsel.

Mr. Strong: I offer Government's Exhibit 24 to 35, inclusive, in evidence.

Mr. Carr: I would like to see them. I cannot very well object to them in a group that way.

The Court: All right.

(Brief pause in the proceedings.)

Mr. Carr: Well, now, for example on Exhibit No. 35 you have got the words "Paul Ziegler" and "West Coast Supply—7-30-46" in pencil.

I am going to object to that document on the ground that the foundation has not been properly laid. It is not material to any issue in the case.

The Court: The objection is sustained on that ground. Let us dispose of each one now.

(Testimony of Paul H. Neff)

Do you have anything further to offer on the foundation of this, Mr. Strong? Mr. Carr calls attention to some pencilled notations there.

Mr. Strong: Yes.

Q. Would you examine Government's Exhibit No. 35 for identification and state whether you know who, if anyone, [186] wrote the pencilled notation?

A. It looks like Mr. Moseley's writing.

Q. You did not write it? A. No, I didn't.

Mr. Strong: I withdraw Government's Exhibit 35, if your Honor please.

The Court: All right.

Mr. Carr: Is that a "8", Mr. Clerk, or a "7"?

The Clerk: That is "7."

Mr. Carr: I will object to all of these, and that is from number—

The Court: 24.

Mr. Carr: 24 through—

The Court: 34, inclusive.

Mr. Carr: 34 or 35, your Honor?

The Court: 34. Counsel has just withdrawn 35.

Mr. Carr: Oh, yes, that is right, Exhibit 35. Through 34 on the ground as I have heretofore stated, without enlarging on it, that the information does not state an offense and that there is no evidence to bind the West Coast Supply Company to this transaction. It is immaterial.

The Court: You are not objecting to the foundation?

(Testimony of Paul H. Neff)

Mr. Carr: No, I won't object to that. But I do want to specifically now object to Exhibit 32, your Honor. That is a letter purporting to be signed by Allan Ziegler. Perhaps your [187] Honor will want to see that.

I object to that as not within the issues of the case. It does not tend to prove or disprove any issue in the case. It is immaterial and it is inadmissible against either Paul Ziegler or Allan Ziegler who is not a defendant in this case.

It has nothing to do with the transaction involved.

Mr. Strong: May I be heard on that, your Honor?

The Court: There is no foundation laid establishing the signature of Allan Ziegler, is there?

Mr. Strong: There is foundation laid, your Honor, for establishing the signature of Allan Ziegler. This is part of the records that these people have in connection with this 80,000 pound transaction. I can lay a further foundation as to where they got the letter. I think that letter speaks for itself in dealing with the transaction which was carried on between the witness's firm and the purchaser of the sugar.

The Court: That part of it is all right. But the second part of it is what the court feels is objectionable. In other words, suppose this were written by the janitor of the building. There is nothing here to show it was written by this man. That is my thought about the matter.

Mr. Strong: I will withdraw it for the time being just to save time, your Honor.

Has your Honor ruled on the offer of the balance of the documents? [188]

(Testimony of Paul H. Neff)

The Court: Yes. The balance of the documents will be admitted, unless there is some specific objection such as pointed out to the court in this Exhibit 32.

The Clerk: That will include Government's Exhibits 24 to 34, inclusive but excluding 32.

Mr. Carr: You excluded one other one.

The Clerk: Yes, 35 was excluded.

The Court: 35 was not excluded. It was withdrawn.

Mr. Carr: Withdrawn, I mean.

(The documents referred to were marked Government's Exhibits Nos. 24 to 31, inclusive and 33 to 34, inclusive, we introduced in evidence.)

Q. By Mr. Strong: As far as your recollection goes in the records which you have disclosed did you at any time receive a ration check for the 80,000 pounds of sugar covered by the transaction we have been discussing here?

Mr. Carr: I object to that question. It is compound and confusing.

The Court: Read it, please.

(Question read by the reporter.)

The Court: I think it calls for a conclusion of the witness, counsel. The evidence will develop if it was in connection with this or not.

Ask him if he received the ration check on or about this date, and it will then just take a little longer to get the evidence. [189]

Mr. Strong: Yes, your Honor.

(Testimony of Paul H. Neff)

Q. Did you receive a ration check on or about July 1, 1946, from the West Coast Supply Company?

Mr. Carr: Objected to as specifically leading and assuming the issue that is yet to be proved and decided by the jury.

The Court: You mean a ration check was received by this witness from a certain company he cannot state on the stand?

Mr. Carr: It calls for a conclusion, your Honor. That is my objection.

The Court: In other words, he cannot state that he received a check?

Mr. Carr: He can state he received a check, yes.

The Court: If he chose another check from the Standard Oil Company—

Mr. Carr: The check then speaks for itself, your Honor. That is my contention.

The Court: This witness could bring in 40,000 checks and say, "These are 40,000 ration checks we received on that date. Which do you want?" And you say, "You cannot say that it is from the West Coast Supply Company"?

Mr. Carr: Mr. Strong is turning around and asking a leading question after the witness has already testified, and I do not think it is proper to put it in this form.

The Court: I think that is highly technical and an entirely improper objection. [190]

(Testimony of Paul H. Neff)

Mr. Carr: Well, I take exception. I may respectfully do so to your Honor's remark, and I ask you to instruct the jury that means no reflection upon counsel.

The Court: I do not intend to reflect upon counsel on either side.

I expect to preside at this trial and keep it in an orderly manner. I expect to rule according to what I think the law is.

Proceed.

Q. By Mr. Strong: May I have your answer?

A. This check obviously went across my desk. I don't remember the check in particular.

Q. Not this check, but did you receive a check?

A. Yes, sir. I would have to receive a check to cover it.

The Court: That may go out.

Q. By Mr. Strong: I am asking you whether you did?

A. Yes, sir, I received a check.

Q. Was that check the check No. 148, as shown on your various invoices and other documents?

A. Yes, sir.

Q. Was that for 80,000 pounds of sugar?

A. Yes, sir.

Mr. Strong: At this time, your Honor, I offer in evidence Govenment's Exhibit 3 for identification which is the check. [191]

(Testimony of Paul H. Neff)

Mr. Carr: I object to it on the ground, if the court please, no proper foundation has been laid, no knowledge, no evidence of any knowledge on the part of the West Coast Supply Company, no evidence as to who put on the printing "West Coast Supply Company," and it is inadmissible against either Paul Ziegler or the West Coast Supply Company until connected up; that the check indicates or at least has on the face of it a suspicion of alteration.

I object to it on the ground that the information does not state an offense and upon the further ground that the partnership cannot be guilty of an offense and, thereby, it is not admissible.

The Court: Will counsel point out the alteration to which he directs the court's attention?

Mr. Carr: I am contending that "West Coast Supply Company" in typing, that there is no foundation for it, your Honor, and from the evidence heretofore placed in the record, plus the statement of counsel at the beginning of the trial that there was something questionable about the checks, and as far as the signature is concerned, I am basing my objection on that ground.

The Court: The check will be admitted against Paul J. Ziegler. It will not be admitted as evidence against the West Coast Supply Company.

The Clerk: Government's Exhibit 3 in evidence. [192]

(The document referred to was marked Government's Exhibit No. 3 and introduced in evidence.)

PRICE OF PRICE ADMINISTRATION

TRANSFER TO THE

SUGAR

RATION BANK ACCOUNT OF

(NAME OF SELLER)

Eighty Thousand

TO THE

UNION BANK & TRUST CO.
OF LOS ANGELES.

BA 11405
COMMERCIAL

FR-121 LOS ANGELES, CAL. 16-77

TABLE 9

16-77

DATE _____

194

AMOUNT IN FIGURES

 ∞

POUNDS OF

SUGAR

(...MOUNT IN WORDS)

(PRINT OR TYPE NAME OF YOUR ACCOUNT)

(AUTHORIZED SIGNATURE)

[illegible]

(Testimony of Paul H. Neff)

Q. By Mr. Strong: Did you ever receive any inquiries or complaints from the West Coast Supply Company as to the 80,000 pounds of sugar involved in this transaction?

Mr. Carr: That is objected to as immaterial, on the further ground that the partnership charged in the information cannot be guilty of a criminal offense.

The Court: Overruled. I understood that there was a specific section of the law which included partnerships. Or am I wrong?

Mr. Strong: Absolutely. May I read it to you, your Honor?

The Court: Yes. It was argued in another case that I had in Fresno.

Mr. Carr: Your Honor, may I correct that? That was a corporation.

The Court: But this was also read. These sections were also read to me.

You are right. That was a corporation.

Mr. Carr: That was a corporation.

The Court: You are right.

Mr. Strong: This is Title III of the 2nd War Powers Act. It is contained in 50 U. S. Code Appendix, Section 633.

Title III is Priorities Powers. This is the section [193] under which this information is drawn.

Subsection (3) of Section 2 (a) of this Title states as follows—I shall only read a part of it. Well, I will read the whole section:

“The President shall be entitled to obtain such information from, require such reports and the keeping of such

(Testimony of Paul H. Neff)

records by, make such inspection of the books, records and other writings, premises or property of, any person (which, for the purpose of this subsection (a), shall include any individual partnership . . .) . . .”

And there is some more in the sentence.

Mr. Carr: I might just say this: that the statute also provides for a partnership to make an income tax return, but you cannot find one case in the book where you indict a partnership, you indict the partners.

Mr. Strong: It may be true, but the Congress provides that they may prohibit a partnership from acting, and that “person” is a partnership.

The Court: You have the record clear; and if there is any error by the court, it may be corrected.

However, I am just admitting this last Exhibit 3 against Paul J. Ziegler and not against the West Coast Supply Company.

The Court: Proceed.

Mr. Strong: There is an objection on which your Honor —194] has not ruled which was made to the question asked the witness.

The Court: Yes, it is overruled.

The Witness: There was a letter about a shortage of one bag of sugar on one of the deliveries.

Q. By Mr. Strong: Was that letter received by your company?

A. Yes.

Mr. Carr: If the court please, you have just ruled the letter out of evidence; and I do not think it is proper to get in by indirection what your Honor has just excluded from the evidence. I think that is Exhibit 32, your Honor.

(Testimony of Paul H. Neff)

The Court: I think there, Mr. Strong, the objection is that there is no showing here that this is an authorized signature. I believe that is the trouble.

Mr. Strong: If your Honor please, I am not offering the letter for the signature. This is preparatory to the next question.

The Court: All right, as long as you do not offer the letter. If they got notice there was some objection, you can go that far with the witness, but not into the letter.

Mr. Strong: I am not trying to get the letter in by the back door, your Honor.

The Court: All right.

Q. By Mr. Strong: Did you speak to anyone at the West Coast Supply Company in that connection? [195]

A. No, sir.

Q. Did you do anything in that connection?

A. There was a teletype sent to San Francisco regarding the shortage.

Q. Is that all that was done?

A. That is all. The trucking company made it up later.

Mr. Strong: That is all.

Mr. Carr: Is that all?

Mr. Strong: Your witness.

May I ask one more question?

The Court: Yes.

Mr. Strong: Thank you.

Q. Did you receive payment for 80,000 pounds of sugar?

A. Checks in payment of sugar are all mailed direct to San Francisco.

(Testimony of Paul H. Neff)

Q. Do you receive a commission on sales of sugar?

A. Yes, sir.

Q. Did you receive a commission in this case?

A. Yes, sir.

Mr. Strong: That is all.

Cross Examination.

By Mr. Carr:

Q. When a sugar ration check comes into your office it usually comes by mail, does it? [196]

A. Yes, sir.

Q. Who opens the mail?

A. The girl at the switchboard.

Q. What will she do with a ration check, the general practice?

A. They come to my desk.

Q. Do you examine the ration checks yourself?

A. I look through the ration checks to be sure they are in order.

Q. Is it a practice down there that if you find the check is not properly made out, in your opinion, do you change the check in any way?

A. No, sir.

Q. Never have done that?

A. No, sir.

Q. All right. I am going to show you Exhibit No. 3, and I am going to ask you the specific, positive question whether or not you can state under oath that that "West Coast Supply Company" was written on there at the time the check arrived at your concern?

Mr. Strong: Your Honor, I object. The witness has said he does not remember seeing it.

The Court: This is cross examination. Counsel has the right to ask these questions.

(Testimony of Paul H. Neff)

Mr. Strong: I will withdraw the objection. [197]

The Witness: That check must have been order, or it would have gone back to West Coast for correction.

Mr. Carr: I move to strike that answer as not responsive.

The Court: Strike it out.

Mr. Carr: And ask that the question be repeated.

Now, listen carefully to it and see if you can answer it.

(Question read by the reporter.)

The Witness: Well, I have stated that I don't remember this check in particular; and I can't say that I do remember it in particular. But the check must have been in order or it would have gone back.

Mr. Carr: I move to strike that portion of the answer, your Honor, as not responsive.

The Court: It may go out.

Q. By Mr. Carr: As a matter of fact, Mr. Neff—I will withdraw that.

How many typewriters do you have or did have at your office at that time? A. Three.

Q. Three? What kind of typewriters were they; do you know?

A. One is a Remington and one is an Underwood. I don't recall the other one.

Q. Are they still there? [198] A. Yes, sir.

Q. And they are the same typewriters that were in your office on July 1, 1946? A. Yes, sir.

Q. Is it not a fact, Mr. Neff, that that check arrived at—what is the name of your concern?

A. Sims-Thompson Company.

(Testimony of Paul H. Neff)

Q. —Sims-Thompson Company, and that to your knowledge someone in that company typed in “West Coast Supply Company”? A. No, sir.

Q. You say that is not true?

A. We never do. We never do that.

Q. I am not asking you that. I am saying that is not true; is that your testimony?

A. That is not true.

Q. You are positive in that? A. Yes, sir.

Mr. Carr: Now, at this time, your Honor, I want to request permission to have an expert examine the typewriters at that concern and to make a comparison with this check. I don't know how much delay it will take. I am not asking for a continuance, but I want the privilege at least to ascertain those facts.

Mr. Strong: If your Honor please, I object to it simply on this ground: [199]

I do not think it makes the slightest bit of difference whether the name “West Coast Supply Company” was on that check when it left the hands of Paul Ziegler or anybody else or whether that “West Coast Supply Company” was subsequently added to that check by anyone.

I think that the prime consideration is whether that check was a ration check issued to transfer ration points to the seller of sugar in connection with the purchase of sugar which was delivered to either the West Coast Supply Company or the defendant, and the omission or presence of that name “West Coast Supply Company” at any particular time is wholly immaterial.

The statute, as a matter of fact, does not have to be construed to require that a check be completely drawn at the moment that it leaves the hands of the person drawing

(Testimony of Paul H. Neff)

it. Whether a check is drawn is a technical question, and it may relate to the time that it reaches the bank on which it is drawn. And while I do not want to foreclose any examination into the facts as to the typewriters—I have no objection to that—I don't think it would make any difference at all one way or the other whether the typewriters were or were not the same and whether the name was or was not added by Mr. Ziegler or somebody else at any time during the process of transferring this sugar.

The Court: Well, the defense has the right to pursue [200] whatever theory they feel is correct in the matter.

Mr. Carr: I shall try to avoid unnecessary delay, but I feel compelled to prove that.

The Court: The request will be granted.

Q. By Mr. Carr: You talked to Mr. Strong during the lunch hour, did you? A. No, sir.

Q. When was the last time you talked to Mr. Strong?

A. Yesterday morning.

Q. At that time did you discuss with him whether "West Coast Supply Company" appeared on Exhibit No. 3?

A. Mr. Strong asked me if we ever did that, and I told him that it was not the practice of our office to alter or touch a ration check in any way. If it was not in order, it went back to the customer for correction.

Q. Mr. Strong specifically asked you, though, if "West Coast Supply Company" was on this check when it came to you, did he not? A. Yes, sir.

Q. And you told him it was not, did you not?

A. No, sir.

Q. What did you tell him?

A. I told him exactly what I told you.

(Testimony of Paul H. Neff)

The Court: What did you tell him?

The Witness: I told him that if there was any irregularity on any ration check, it went back to the customer for correction.

Q. By Mr. Carr: Is that the only time you discussed this matter of whether or not "West Coast Supply Company" appeared on Exhibit No. 3 with any Government official?

A. Yes, sir.

Q. Did you not discuss it with the OPA agents?

A. No, sir.

Q. Have you talked to the agents?

A. No, sir.

Q. That is the only time you talked to Mr. Strong?

A. Yes, sir.

Q. And I assume Mr. Strong told you to tell the truth at that time?

A. Yes, sir.

Mr. Strong: Are you finished?

The Court: Any questions?

Redirect Examination.

By Mr. Strong:

Q. Did I not tell you to tell the truth at all times?

A. Yes, sir.

Q. I specifically told you that, did I not?

A. Yes, sir.

The Court: He said he did now. [202]

Mr. Strong: It is just that there was an implication.

The Court: No, there wasn't an implication.

Mr. Carr: I was just picking up an old practice that I know is carried on in the Department.

The Court: Any other questions?

(Testimony of Paul H. Neff)

Mr. Strong: None.

The Court: That is all.

Mr. Carr: Could this witness remain on subpoena, your Honor, subject to call?

The Court: Yes, if you have any other questions.

Mr. Carr: In connection with the examination of the typewriters, this typewriter matter.

The Court: The expert, if he goes in and brings back samples and testifies—

Mr. Carr: I want him to identify the typewriters, this particular witness. He can go, but subject to call.

The Court: He will be available if the Government wants him or if the defense wants him.

Call your next witness.

Mr. Strong: Well, your Honor, I am not quite clear as to what this process is of having the typewriters examined.

Mr. Carr: You leave that to us, Mr. Strong. We will work that out.

The Court: I have granted the motion of the defendant here to have the specimens of the typewriters in the office [203] of the Sims-Thompson Company brought into court.

Mr. Strong: I just proceed with my case?

The Court: Oh, yes.

Mr. Strong: Thank you, your Honor.

Mr. Smith. First, may I have a recess at this time, your Honor? It is close to 3:00 o'clock.

The Court: If it will help you to organize, we will take a recess.

Ladies and gentlemen of the jury, remember the admonition I have heretofore given you. Do not discuss the matter among yourselves or permit anyone to discuss it in your presence. Do not form or express an opinion on the matter until it is finally submitted to you under the instructions of the court.

(Brief recess.)

The Court: Do you stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Is it stipulated the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Proceed.

Mr. Strong: Mr. Smith. [205]

LAWRENCE A. SMITH,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Lawrence A. Smith.

The Clerk: L-a-w-r-e-n-c-e A. S-m-i-t-h?

The Witness: That is right.

The Court: Let the record show that the defendant has submitted to the court proposed instructions.

Mr. Strong: Let the record show that I have received a copy, too.

The Court: All right.

(Testimony of Lawrence A. Smith)

Mr. Carr: Your Honor, we may have additional instructions. I don't want to preclude myself. I don't think there will be many.

The Court: As long as I have some instructions to work on, additional instructions will be considered.

Direct Examination.

By Mr. Strong:

Q. What is your occupation?

A. Salesmanager in charge of the sugar department, Kelley-Clarke Company.

Q. Did you hold that position in July, 1946?

A. I did. [205]

Q. I show you Government's Exhibit 15-A, -B, -C, and -D and ask you if you ever saw these before?

A. There is two of these documents, I believe, are the ones you asked me to bring up.

Q. Yes. Are you—

A. The others I haven't seen.

Q. Are you acquainted with that transaction?

A. This is a W.D.A.—warehouse delivery advice, this copy here.

The Court: What is the exhibit number?

Mr. Strong: 15-C.

The Court: All right.

Q. By Mr. Strong: I do not want you to describe the exhibit. I want to know whether you are acquainted with that transaction that it represents.

A. I don't understand your question—"acquainted."

The Court: Listen to the question. Repeat the question.

(Question read by the reporter.)

(Testimony of Lawrence A. Smith)

Mr. Strong: Let me reframe it.

Q. Do you know anything about that transaction?

A. Yes.

Q. In your official capacity with the Kelley-Clarke Company did you have anything to do with the transaction?

A. Nothing except some detail pertaining to it.

Q. What detail? [206]

A. The order was placed—I didn't take the order—and the order comes into the office.

The Court: No, not what you did not do. Listen to the question.

It is difficult for lay witnesses to understand the procedure in court. Re-read the question.

(Question read by the reporter.)

The Witness: The ration check that comes in in the morning would go across my—

The Court: No, not what would be. Listen to the question. Counsel has asked you for just what you did in connection with this transaction, if anything.

Now, just what you did, not what might have been done or what would be done. All right.

The Witness: The only thing that I did with this transaction was it would be with other documents that come across my desk for matching with orders, and they would be handed to the girl in the office to pass on. That would be my duties with the transaction.

Q. By Mr. Strong: You say two of those documents are documents which you produced?

A. No, I didn't produce these documents. The girl in the office types those documents.

(Testimony of Lawrence A. Smith)

The Court: No, that is not the question. He did not ask you who made them up. [207]

Who brought them here? Did you produce them in court?

The Witness: I brought these documents up. I beg your pardon.

The Court: All right.

Q. By Mr. Strong: Did you have anything to do with the ration check which covered that transaction?

A. Nothing, except to match it with the order and to hand it on to the girl to send to the refinery.

Q. Is that what you did?

A. I received the ration check as it comes into the office.

Q. In this particular instance is that what you did in this instance? A. That is right.

Q. What did you do with the check?

A. It would be passed on to the girl for recording in the ration book and sent on to the refinery.

Q. You send it on to the refinery?

A. We mail it to the refinery, no.

Q. Do you dictate the letters? A. No.

Q. But the check comes into your possession at some time during this process?

A. When the mail comes in.

Q. I show you Government's Exhibit 5 and ask you whether [208] you recall ever seeing this check before?

A. Yes, you showed me this check yesterday.

Q. Before yesterday did you ever see it?

A. I couldn't remember. There is hundreds of checks that go through.

(Testimony of Lawrence A. Smith)

Q. I see. In connection with this transaction covering 30,000 pounds of sugar, as represented by Government's Exhibits 15-A, -B, -C and -D, did you receive a ration check?

Mr. Carr: I don't want to be unfair, but I think he has answered that pretty clearly, your Honor.

The Court: Yes.

Mr. Strong: I am not sure of the answer, your Honor.

Mr. Carr: He said he did not know, I thought.

Mr. Strong: That is not my recollection.

The Court: Read the witness's answer.

(Answer read by the reporter.)

Q. By Mr. Strong: That is with reference to that particular Government exhibit, the check itself.

Now I am asking whether you received a check or not—that is my question, your Honor—this check, Governments' Exhibit 5.

A. Yes, we received a check for the transaction. We would have to receive a check.

The Court: No, strike out "we would have to receive a check." [209]

The Witness: Oh!

Q. By Mr. Strong: Do any of your records show that fact? A. Yes.

Q. I am handing back to you some documents which you handed to me the other day.

Will you indicate which of the records show that?

A. The records showing—

The Court: Now, wait.

Mr. Strong: Just pull it out and hand it to me.

The Court: And identify it.

(Testimony of Lawrence A. Smith)

Mr. Strong: May I have this marked for identification?

The Clerk: Government's Exhibit No. 36 for identification.

(The document referred to was marked Government's Exhibit No. 36 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 36 for identification and ask you to state what this is.

A. This is a sheet from our sugar rationing book which shows the record of the check, the number of the check—

Mr. Carr: Just a moment. I submit that the foundation has not been laid for this document. Furthermore, the witness is not shown to be qualified to speak, and third, he is reading from an exhibit which speaks for itself.

The Court: A better foundation should be laid, of course. [210]

Q. By Mr. Strong: Mr. Witness, do you have charge of the records with reference to the sugar rationing checks at the Kelley-Clarke Company?

A. I would have charge of the department in which the records are kept, yes.

Q. Are those records kept officially under your custody? A. Yes.

Q. Is that Government's Exhibit 36 a part of those records? A. Yes.

Q. That is part of the records kept in the due course and the ordinary course of business of your company?

A. Yes.

(Testimony of Lawrence A. Smith)

Mr. Strong: I offer this document in evidence, your Honor.

Mr. Carr: Objected to as being immaterial, incompetent as against either the partnership or Paul J. Ziegler, the defendant. And I would like, if I may, to incorporate those additional objections I made a moment ago to one of the checks, your Honor.

The Court: It may be incorporated. It is incompetent and, therefore, that goes to the fact it has nothing to do with the transaction.

Mr. Carr: Pardon me. Perhaps I should be more specific and say, your Honor, that it is not binding upon [211] either of the defendants.

The Court: There are legends on here and numbers on here that certainly would have to be explained before I could pass on the objection.

Mr. Strong: Well, that is what I was trying to do before, your Honor, when the other objection was sustained.

The Court: Mr. Cross.

The Clerk: Yes, your Honor. (Handing document to counsel.)

The Court: The objection that an instrument speaks for itself is good when you can look at the instrument and read it and know exactly what it purports to be. But if there are trade symbols or abbreviations, then the instrument does not speak for itself without someone who can interpret those to the court or the jury. All right.

Q. By Mr. Strong: Would you indicate where this document relates to the transaction of the 300,000 pounds of sugar as shown by Government's Exhibits 15-A, -B, -C and -D?

(Testimony of Lawrence A. Smith)

Mr. Carr: I think that is 30,000 pounds.

Mr. Strong: 30,000 pounds. I am sorry.

The Witness: That would be in this last transaction dated July the 1st, check No. 145, invoice No. C-4280.

Q. By Mr. Strong: You are now reading from Government's Exhibit 36 for identification? [212]

A. That is right.

Q. On that invoice 4-C280 is the same as Government's Exhibit 15-A for identification?

A. C-4280, right.

Q. And this statement here in the column which is headed "Check - Date - No.," the legend being "7/1" and the number being "145," what does that show?

A. That is the date of the check that came in the office and the number.

Q. The number on the check? A. Right.

Q. Where, if anywhere, does it show the value of the check?

A. Right over here in this column, "Value of Check,"

Q. What does it say? A. "30,000 pounds."

Q. And it says "7-3" after that. What is that?

A. That is the date it was mailed to the refinery.

Q. Does this document in any way show the delivery of 30,000 pounds of sugar? A. It does not.

Mr. Strong: Thank you.

I offer this in evidence.

Mr. Carr: Same objection.

The Court: Subject to the same objection, it is in [213]

The Clerk: Government's Exhibit 36 in evidence.

(Testimony of Lawrence A. Smith)

(The document referred to was marked Government's Exhibit No. 36 and introduced in evidence.)

Mr. Carr: May I add just one objection, your Honor?

The Court: Yes.

Mr. Carr: It just slipped my mind for the moment.

This check being for 30,000 pounds, I object to the introduction of that on the additional ground that the bank account shows on the date in question there was to the credit more than 30,000 pounds of sugar. For that reason it could not be an offense.

Do I make my self clear?

The Court: Yes, I understand your objection.

Mr. Strong: May I be heard?

The Court: Yes.

Mr. Strong: There were four checks issued on the same day. They are considered as part of one transaction unless they can be shown that anyone came before any of the others. The four checks are in total in excess of the balance.

I believe that the record itself will show that any one of these checks is also in excess of the balance.

Mr. Carr: May I pass this up to the court and then let the court look at the figures? And then you will see what the balance is. That is as of July 1st.

(Document handed to the court.) [214]

Mr. Strong: May I add this, your Honor? The witness from the bank specifically testified that the first check that came in was the check for 600,000 pounds or 660,000 pounds—I don't remember which it is—and that he at that time questioned its being in excess. Consequently, all of these checks came after that time.

(Testimony of Lawrence A. Smith)

Mr. Carr: Well, now, I submit that was not my understanding of his testimony. He did not say which one came in first, I don't think, Mr. Strong. I may be in error about that.

Mr. Strong: I think he did, your Honor. It is possible, your Honor, that that record itself shows which is the first check that came in.

The Court: Yes, it does. But I want to be sure of it.

This record shows that on July 11th, 1946, there was a credit of 231.96. That was the balance. And on July 25 there was a check for 6,000. And on that date the record shows an overdraft of 5,768.04.

That is followed by a check for 300, then 6,600 and another check for 800.

Those three last checks that I have named were charged against this account on August 1, 1946, leaving an overdraft of 13,468.04. And then on August 22nd another check for 50.00, an overdraft then of 13,518.04.

I wish both counsel would examine the exhibit to see if [215] I am correct in that interpretation of the document.

Mr. Strong: May I indicate to your Honor—I don't know whether your Honor recalls the witness's testimony—but this is a machine that is used, a dollar and cents machine; and that isn't as your Honor read it as appears here.

These are thousands; so that the first check is not for 6,000 but is for 600,000.

(Testimony of Lawrence A. Smith)

The Court: Yes. But I was reading it exactly as it appears in that exhibit because I have no right to read anything else into it.

Mr. Strong: Yes. I thought possibly it was not clear.

Mr. Carr: Well, perhaps I did not make myself too clear on it.

I simply stated this: If I have \$10,000 in the bank and I write a check \$12,000 and one for five, the \$12,000 check is sent back but the \$5,000 check is cashed. So it is not an overdraft.

Simply stated, that is it.

The Court: No, the first one would be paid if the 6,000 went in first. If the small check went in first, you would not have an overdraft against that.

Mr. Carr: That's right. But if it went in second, it would be paid, too, your Honor, because if you sent a check into the bank on an account of, say, that \$10,000 and you wrote a check for \$12,000, the bank would immediately send [216] that check back.

The Court: That is right.

Mr. Carr: Then your \$5,000 check, which was written second, would go in and be paid.

The Court: That is true, if they had the money there to pay it.

Mr. Carr: And that was the situation there. There wasn't enough in the account to cover this 80,000 pounds of sugar that is involved in counts 7 and 8.

(Testimony of Lawrence A. Smith)

Mr. Strong: I submit to your Honor that there was not sufficient in the account.

The amount in the account, as shown by that document, is on that date 23,196 pounds. And a check for 80,000 pounds could not be drawn against 23,196 pounds. It is obviously insufficient by 50,000 pounds.

The Court: That is an argument to the jury by both sides.

Mr. Carr: That is my objection, counsel.

The Court: Yes, overruled.

Mr. Strong: May I have the last question?

(The question referred to was read by the reporter as follows:

“Q. Does this document in any way show the delivery of 30,000 pounds of sugar?”)

Q. By Mr. Strong: Did you receive the commission, [217] broker's commission, in connection with the purchase of the sugar involved that we are talking about here?

A. Yes, we did.

Q. Now, let me ask you: Do I understand correctly all of the ration checks go across your desk?

A. That is right.

Q. At any time during July, 1946, was there any sale of sugar to anyone for which your firm did not receive a ration check for the full amount?

Mr. Carr: Objected to as being immaterial.

The Court: Yes, I think that is immaterial.

Mr. Strong: I submit, your Honor, that if he has received all checks for all sales, it must necessarily include this check for this sale.

(Testimony of Lawrence A. Smith)

Mr. Carr: That is a very serious way to pin down a defendant, though, by using the word "all" and encompass all transactions.

It seems to me the specific transaction involved here is the question.

The Court: I think it is this transaction and this check we are dealing with, counsel.

Mr. Strong: All right. I offer in evidence Government's Exhibit 5 for identification which is a ration check for 30,000 pounds.

Mr. Carr: You are offering that? [218]

Mr. Strong: Yes, sir.

Mr. Carr: I am objecting to it on many and varied grounds I have already set forth and particularly with reference to both defendants. First it is a partnership, and there is no knowledge shown at all nor authority for the name to be on there. There is the suspicion of alteration so far as the defendant Ziegler, Paul Ziegler, is concerned; that it is inadmissible as against him because, first of all, the information does not state an offense against him and that the posture of the evidence at this time is such that no offense can be stated against either of the defendants under any of the counts in the information.

The Court: It will be admitted against Paul J. Ziegler. It will not be admitted against the West Coast Supply Company and none of the exhibits that have been introduced in evidence up to this time have been admitted against the West Coast Supply Company.

The Clerk: Government's Exhibit No. 5 in evidence.

(The document referred to was marked Government's Exhibit No. 5 and introduced in evidence.)

OFFICE OF PRICE ADMINISTRATION

TRANSFER TO THE

SUGAR

RATON BANK ACCOUNT OF

WATER OF THE

Thirty Three and

(2000-11-10)

West Coast Supply Co.

UNION BANK & TRUST CO.

OF LOS ANGELES
COMMERCIAL

34 RINGS

FR-121
LOS ANGELES, CAL.

16.77

PRINT OR TYPE NAME OF YOUR ACCOUNT)

Handwritten Signature
(A MONICED SIGNATURE)

(A) MORZEO SIGNATURE)

DATE:

1945

AMOUNT IN FIGURES

200

FOUNDS OF

SUGAR

8/20/43
10th H Bldg 3
Mk
Capt. J. J. Jones

17166
1888
1888

62

[Faint handwritten notes at the bottom of the page]

五

25-16 25 475 22 16 16
COOPERAL HEEVE EARS OF 16 16 16

(Testimony of Lawrence A. Smith)

The Court: All right.

Mr. Strong: That is all.

The Court: Cross examine.

Mr. Carr: That is all I have, your Honor.

The Court: That is all.

(Witness excused.) [219]

The Court: Call your next witness.

Mr. Carr: That was Exhibit 5; am I right?

The Court: Exhibit 5, yes.

Mr. Carr: Your Honor, I am sorry. I did not hear your ruling. May I have the reporter read it to me?

The Court: Yes.

(Record read by the reporter.)

Mr. Strong: Mr. Ramseur.

STEPHEN D. RAMSEUR,

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Stephen D. Ramseur, R-a-m-s-e-u-r.

The Clerk: How do you spell "Stephen"?

The Witness: S-t-e-p-h-e-n.

Mr. Carr: What was that name?

The Clerk: Stephen D. Ramseur, R-a-m-s-e-u-r.

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Ramseur?

A. Investigator for the Alcohol Tax Unit, Bureau of Internal Revenue.

(Testimony of Stephen D. Ramseur)

Q. Did you at any time during 1946 have occasion to [220] visit the premises of the West Coast Supply Company? A. I did, yes, sir.

Q. What was that in connection with?

A. The first time was in connection with the serving of a demand letter.

Mr. Carr: Serving what?

(Answer read by the reporter.)

Q. By Mr. Strong: When was that?

A. On November the 14th.

Q. What year? A. What?

Q. What year? A. '46. 1946.

Q. Were you at that time on the premises of the West Coast Supply Company in connection with your official duties? A. Yes, sir.

Q. Were you engaged in the making of an investigation for the Alcohol Tax Unit?

Mr. Carr: Objected to as being wholly irrelevant. He has already put him on the premises, your Honor. I don't think the purpose that he has there is material, bringing some other investigation into this case.

The Court: I do not think it is either. I shall sustain the objection.

Q. By Mr. Strong: Did you on that occasion see the [221] defendant Paul J. Ziegler?

A. Not on that occasion, no, sir.

Q. Whom did you see? A. Allan Ziegler.

Q. Did you make any requests of Allan Ziegler?

Mr. Carr: That is objected to as wholly immaterial. Allan Ziegler is not involved in this case in any way. There is no proof concerning Allan Ziegler at all. He is not a defendant.

(Testimony of Stephen D. Ramseur)

The Court: If it has something to do with the partnership it might be material, Mr. Carr. That would be the only theory.

Mr. Carr: Yes, I grant you that possibly could be the only theory.

The Court: All right.

Mr. Strong: That is the only theory.

The Court: All right.

Mr. Carr: But I am not waiving my objection.

The Court: Oh, no.

Q. By Mr. Strong: Will you state what was said by you and by Allan Ziegler?

A. What was said by Allan Ziegler?

Q. And by you on that occasion.

A. Well, we asked that form—the demand letter is a department form, the original and a duplicate, the copy. The [222] copy has on the reverse side a place for the signature of the person you served it on acknowledging receipt. We asked him if he would sign the acknowledgment, and he said no. I asked him if he would acknowledge that he had received it, and he said he was making no statements. And that was all that was said.

Mr. Carr: Now, then, I move to strike all of that testimony. It is wholly immaterial, and it is prejudicial to this defendant.

The Court: I do not know. Maybe he was there before.

Mr. Carr: That particular conversation certainly has no bearing on the issue in this case. The fact that Allan Ziegler refused to cooperate with him, your Honor, certainly does not in any way mitigate for or in behalf of defendant or against him.

(Testimony of Stephen D. Ramseur)

The Court: That is proper in direct. That has nothing to do with the case so far.

Mr. Strong: What was the ruling?

The Court: That has nothing to do with the case so far.

Mr. Strong: I would like to question him further.

The Court: All right.

Q. By Mr. Strong: Was that about all that was said? A. That is about all.

Q. Did you return on a subsequent occasion?

A. I did. [223]

Q. Was that in connection with the demand order?

A. It was, yes, sir.

Q. Did you see anybody there?

A. Mr. Paul Ziegler at that time.

Q. The defendant in this case? A. Yes, sir.

Q. Who else was present?

A. Well, there were a number of office employees. We waited out in front.

Q. Who is "we"?

A. Mr. Tingle and I, investigator Tingle and I who were working together.

Q. And when was this second occasion?

A. The 21st of November, 1946.

Mr. Carr: It is very difficult to hear the witness.

The Court: Speak a little clearer so the jury and counsel can hear you.

Q. By Mr. Strong: Did you have any discussion with Paul J. Ziegler on that occasion?

A. I did, yes.

Mr. Carr: What was that date? May I have that?

Mr. Strong: The 21st of November. Is that right?

(Testimony of Stephen D. Ramseur)

The Witness: Yes.

Mr. Carr: What year?

Mr. Strong: '46. [224]

Mr. Carr: I object to any conversation in November, '46, unless it is in the form of an admission.

The Court: That is the only purpose it could have. Proceed.

Q. By Mr. Strong: Go ahead.

A. We called on Mr. Paul Ziegler. We sent the letter, demand letter to San Francisco, the main office, and they returned the copy.

The Court: Not what you did with someone else. Just listen to the question. Repeat the question again.

The Witness: We called on Mr. Paul Ziegler and asked him if he would sign or asked his brother Allan to sign the receipt for the demand letter.

Q. By Mr. Strong: Yes?

A. And Mr. Ziegler stated—

The Court: Which one now? You have named two.

The Witness: Mr. Paul Ziegler stated that he would not request or ask his brother to sign it nor would he sign it.

Q. By Mr. Strong: Yes?

A. That he had no intentions of complying with the request in the demand letter.

Q. Yes? Is that all that was said on that occasion?

A. No. There was more said.

Q. Did you make any request of Mr. Paul Ziegler?

A. No, no request. No, we asked him about the sugar. [225] He said he had sold no sugar.

Mr. Carr: Well, now, just a moment, your Honor. I am going to move to strike this whole conversation up

(Testimony of Stephen D. Ramseur)

to now on the ground that it has no bearing on any of the issues in this case.

The Court: That is correct so far. Let us get into the next question now.

Q. By Mr. Strong: What were you doing then on that occasion?

A. We went there—Mr. Tingle and I went there to see if someone would sign the acknowledgment of the request, acknowledging the receipt of the demand letter.

Q. Were you investigating something?

Mr. Carr: That is objected to, your Honor. Why bring in another matter?

Mr. Strong: This is not another matter, your Honor. This is the same transaction. If counsel would let me ask a few more questions, I should like to bring it out. It is subject to be stricken.

The Court: If you can connect it up, I shall permit it. But the court takes the view of counsel for the defendants at this point, if it is not connected up.

Mr. Carr: I am going to forewarn Mr. Strong if he brings in some damaging thing, what the consequences are on this. [226]

Mr. Strong: I shall accept your Honor's ruling.

The Court: All right, proceed.

Q. By Mr. Strong: Do you have a copy of the demand letter? A. No, I have not.

Q. Is it in your files?

A. The files is in San Francisco.

Q. Did you have any discussion with Paul Ziegler about any sugar? A. I did, yes.

(Testimony of Stephen D. Ramseur)

Q. What sugar did you discuss with him?

A. Sugar that he had obtained.

Mr. Carr: I move to strike that as a conclusion of the witness.

The Court: Yes. Now, you say sugar that he had obtained. You see, that is a conclusion of yours.

What did Paul Ziegler say? What did you ask him, and what did he say?

The Witness: We asked him what disposition was made of the sugar that he had, and he said, "You want to know what happened to the sugar?" He said, "We used it in manufacturing a number of products."

The Court: What sugar. Was there any identification of it?

The Witness: No, not at that time. There was nothing [227] said about what sugar. We went there to serve the demand letter and get it signed, and he said that he would not sign it; that if we would leave the syrup out—this demand letter called for a return of sales of sugar and syrup. He said if we left the syrup out, there would be no need of making a demand letter, filling the demand letter out, the requirements of it, as they sold no sugar. It was all used in the manufacture of product there in the plant.

Q. By Mr. Strong: Is that all that was said on that occasion?

A. Just about all, yes.

Mr. Strong: I will agree to strike this witness's testimony, your Honor.

The Court: Yes, it is not competent. It may go out.

Mr. Strong: I agree to have the jury instructed to completely disregard anything he said.

The Court: The jury is instructed to completely disregard anything this witness has said.

That is all.

(Witness excused.)

Mr. Strong: Mr. Tingle. May I speak to the next witness a moment, your Honor?

The Court: Yes, certainly.

Mr. Strong: Because I don't want to burden the jury or the court if it is not necessary. [228]

(Brief pause in the proceedings.)

BENJAMIN H. TINGLE,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Benjamin H. Tingle.

The Clerk: T-i-n-g-l-e?

The Witness: T-i-n-g-l-e.

Direct Examination.

By Mr. Strong:

Q. What is your occupation?

A. Investigator, Alcohol Tax Unit.

Q. Did you hold that job during 1946?

A. Yes.

Q. Now, in November, 1946, did you have occasion to go to the premises of the West Coast Supply Company?

A. I did.

Q. Did you go alone? A. No, sir.

Q. With whom did you go?

A. I went with Mr. Ramseur and Awrey, investigators.

(Testimony of Benjamin H. Tingle)

Q. Who?

A. Ramseur and Awrey, A-w-r-e-y. [229]

Q. Were you there investigating anything in connection with the Alcohol Tax Unit?

A. Well, we went there on November the 14th to serve what we call a demand letter upon him under Regulation 17 to report sales of sugar.

Q. What sugar?

A. Well, sugar that he had obtained, what we had learned about that he had obtained through the OPA by issuance of checks.

Mr. Carr: I object to that and move it be stricken as purely hearsay.

The Court: It is hearsay. It may go out.

Q. By Mr. Strong: Did you receive any communications from the OPA?

A. Well, only verbally, I believe. We talked with the investigators at the OPA about the matter, yes.

Q. Did you return there on November 21, 1946?

A. Yes, sir.

Q. Did you have any discussion with Paul J. Ziegler?

A. Yes, sir.

Q. Will you state what you said and what he said?

A. Well, we went there to get him to have his brother sign a receipted copy of Regulation 17 letter which we had served upon him a week before. We had served the demand letter upon his brother, Allan; and they had refused to sign [240] the receipted copies of the demand letter. And that was why we returned there the second time, to see if we could get him to sign this letter.

(Testimony of Benjamin H. Tingle)

Q. Do you have a copy of the letter with you?

A. No, I do not.

Q. Do you know where it is?

A. Yes, sir. It is in our files in the Alcohol Tax Unit.

Q. In Los Angeles?

A. In Los Angeles, yes sir.

Mr. Strong: It may save time, your Honor, if this witness is excused to get the letter. I was under the impression that these witnesses would have the letter here.

The Court: All right.

Mr. Strong: Would you do that?

The Witness: Yes.

(Witness temporarily excused.)

Mr. Strong: Mr. Lofton.

FRITZ LOFTON,

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Fritz Lofton, L-o-f-t-o-n. [231]

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Lofton?

A. I work for the Office of Price Administration.

Q. In what capacity?

A. I have charge of the wholesale-retail department.

Q. Wholesale-retail department?

A. That is right.

(Testimony of Fritz Lofton)

Q. Would you explain that more fully?

A. Well, we determine the allowable inventories of wholesalers and retailers and the adjustments.

Q. As to what?

A. As to their allowable inventories of sugar.

Q. I see. You have charge of the records?

A. I do.

Q. With reference to that? A. I do.

Q. I show you Government's Exhibit 10 for identification, which consists of various documents, and ask you whether these are part of the records which are under your care and custody?

A. No, sir, those are not.

Q. What records are those? A. Those are—

The Court: What is the exhibit number?

Mr. Strong: Government's Exhibit 10 for identification. [232]

The Witness: Those are the industrial section.

Q. By Mr. Strong: Will you look through it and see if any of them are wholesale?

A. No, sir, they are not.

Mr. Strong: No further questions.

The Court: That is all.

Mr. Carr: That is all.

(Witness excused.)

Mr. Strong: Mr. Garver.

JOHN W. GARVER,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: John W. Garver, G-a-r-v-e-r.

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Garver?

A. Los Angeles industrial sugar rationing specialist.

Q. With what agency?

A. Office of Temporary Controls.

Q. Were you during 1946 employed by the Office of Price Administration? A. I was. [233]

Q. What was your job then?

A. I was the specialist for the wholesale and retail section. I beg your pardon. 1946?

Q. That's right.

A. February 1st I took over the industrial section.

Q. Would you look at the documents in front of you, which are Government's Exhibit 10 for identification, and state whether any of those documents are part of the files of the Office of Price Administration industrial section?

A. Yes, they are. They are all provisional allowance reports and—

Q. Do not describe them. Just answer it yes or no.

A. Yes. Yes, they are.

Q. All or just some? A. All of them.

Q. Are they part of the official files under your custody? A. They are.

Q. And were they received and used in the due course of business of the Office of Price Administration under your charge? A. They were, yes.

(Testimony of John W. Garver)

Mr. Strong: I offer these documents in evidence, your Honor, Government's Exhibit 10 for identification. And I show them to counsel. [234]

Mr. Carr: May I inquire for what purpose you are offering them?

Mr. Strong: The same purpose: in support of the eight counts of the information to show willfulness, to show the relationship of this defendant to the company, and to show the use of the OPA ration account.

Mr. Carr: I object to this upon the following grounds: as immaterial; and has no bearing on any of the issues in the case. It does not establish any partnership relation. It is inadmissible for that purpose.

It all relates to transactions prior to the date of the charges involved in this information. It raises collateral matters which can only work to the prejudice of the two defendants.

The Court: I shall hear from the Government.

Mr. Strong: The documents are all in the latter part of 1945, I believe. Some of those documents, as to which I may say parenthetically I believe there was a stipulation on the signature of Paul J. Ziegler. Some of those documents indicate that they were filed by Mr. Paul J. Ziegler and with the word "partner—West Coast Supply Company." And some of them are on the letterhead of the West Coast Supply Company.

Mr. Carr: I didn't understand you to say I stipulated to that, did I?

The Court: You stipulated as to the signature. [235]

Mr. Carr: That is true. That still stands. And as far as the admissibility just only for the signature, your

(Testimony of John W. Garver)

Honor, I am not objecting, except on the general ground that I have stated.

However, the material in the document is what I am directing my attention to.

Mr. Strong: If I may continue, your Honor, that material constitutes proper evidence to indicate the relationship between the defendant, Paul J. Ziegler, and the West Coast Supply Company.

The Court: Mr. Reporter, will you read the purpose for which these documents are offered?

(Record read by the reporter.)

The Court: Where do they show willfulness? Which part shows willfulness?

Mr. Strong: I think that the fact that the person whose signature appears on those documents has been engaged in transactions with the Office of Price Administration, as shown by those documents, in itself has a tendency of establishing the fact that he knows what the regulations are about; that he knows how the operations are conducted and that he knows something about the rules and regulations governing rationing.

That, I think, is evidence which tends to show, in the ultimate sense to some degree, the presence of willfulness, knowledge of regulations, specific knowledge, the exercise [236] of various permitted functions before an agency, as to whose regulations are involved.

I think all those tend to indicate that the person knows something about those matters which are in support of willfulness.

The Court: They may be admissible if certain testimony developed, which I shall not indicate at this time.

(Testimony of John W. Garver)

However, I am going to sustain the objection at this time. It might be used in rebuttal if certain testimony developed.

Mr. Strong: Does that also apply to the offer to show the relationship between the defendant, Paul J. Ziegler, and the company?

The Court: I would only admit them as binding at this time, with the testimony in the condition that it is in now, if I admitted them at all, against Paul J. Ziegler.

I am not admitting them against Paul J. Ziegler at this time.

Mr. Strong: Well, if your Honor please, I had thought that those two witnesses were going to take more time than they did.

If we can recess at this time, I can assure your Honor that we will finish with the case by 12:00 o'clock tomorrow. That will give me an opportunity to go over some of the matters.

The Court: About how long, Mr. Carr, do you anticipate you will take? [237]

Mr. Carr: Well, your Honor, I don't want to impose upon your good patience; but I want to ask for considerable time at the end of the Government's case to present a matter which I cannot present, I do not think, under two to three hours.

I am going to cover a great deal of law, a great many citations, both statutory and constitutional law. And I would expect to take a minimum of three hours, your Honor.

Then I think we will be in defense of the case, I should say, not to exceed a day, anyway, maybe less.

(Testimony of John W. Garver)

The Court: I am sure you can, your legal argument in less time than that, Mr. Carr. I have never had a legal argument in 30 years that was that long. Of course, I am always ready to have something new.

Mr. Carr: Your Honor, there are certain constitutional questions involved. It means we have got to go into the Reconversion Act. We have got to go into two constitutional questions, partnership questions; and I have a lot of law briefed, your Honor.

The Court: I have been through a great many constitutional questions, Mr. Carr; so I can save you a lot of time on that.

But I want you to outline it to me, and I want you to give me your position so I will have it clearly in mind. I might ask for additional argument, but I say again in my entire experience I have never had three-hour argument on the law. [238]

Mr. Carr: I don't want to impose on your Honor, but I want to give myself ample time.

I will tell you I have spent about, all told, three weeks on the law in this case; and it is unusual for me to have to spend three weeks looking up the law. It will take three hours to—

The Court: That will be an entire afternoon session, and a forenoon session, for one man arguing the law.

Mr. Carr: Yes, your Honor. It will take three hours to present what I dug up in three weeks.

The Court: I may not be familiar with all the law, but I do not believe I will require a whole day's argument of the law.

Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss the matter among yourselves. You will not permit anyone to discuss this matter in your presence, and you will not form or express any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:05 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., February 6, 1947.) [239]

Los Angeles, California, February 6, 1947, 10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106 Criminal, United States v. West Coast Supply Company, a partnership, and Paul J. Ziegler, for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defense.

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulate.

The Court: Stipulate the defendant is in court?

Mr. Carr: So stipulated.

Mr. Strong: So stipulate. Your Honor, I don't know that I have shown these three exhibits—three, four and five—to the jury. May I do so?

The Court: Yes.

(Counsel passes documents to the jury.)

Mr. Strong: I have no further questions of this witness. (Referring to the witness John W. Garver.)

Mr. Carr: Your Honor, there are some papers that they getting. It might be we could recall this witness and save time.

The Court: All right.

Mr. Carr: Mr. Strong is getting them somewhere upstairs, I think. [240]

Mr. Strong: Yes, that is satisfactory, your Honor.

Mr. Hartt. May I recall the witness Hartt for two questions, your Honor?

The Court: You may.

RICHARD C. HARTT,

a witness called by the Government, having been previously sworn, was recalled and testified further as follows:

Direct Examination (Resumed.)

By Mr. Strong:

Q. Are you the Mr. Hartt who testified previously in this trial? A. I am.

Q. You are the gentleman from the Union Bank and Trust Company? A. Yes, sir.

Q. Mr. Hartt, I want to show you Exhibit 1, which consists of the ledger cards. Before the last two figures there is a period in each instance.

I should like you to state what the figures indicate as to poundage?

Mr. Carr: Well, I submit the figures speak for themselves.

Mr. Strong: There was some confusion, your Honor.

The Court: Do you know what they stand for? [241]

Mr. Carr: I think I do, your Honor.

The Court: Will you state it to the court? That will clear it up. It was not clear to my mind. I read them yesterday.

(Testimony of Richard C. Hartt)

Mr. Carr: They refer to the number of pounds; that's all. They are just simple figures.

The Court: May I have it?

(Witness hands document to the court.)

The Court: Well, here is an item of July 25, 1946: "6,000.00."

So that is 6,000?

Mr. Carr: May I see it, your Honor?

The Court: Hand it to Mr. Carr, please.

(Document handed to counsel.)

The Court: That is 6,000, is that correct?

Mr. Carr: 600,000 pounds of sugar.

The Court: Well, it says 6,000.

Mr. Strong: Your Honor, if counsel will stipulate that the figures could be read without any periods in them—

Mr. Carr: I will.

Mr. Strong: —then there will be no question. So that figure will then read, instead of "6,000.00", it will read "600,000."

The Court: Yes. Yesterday, gentlemen, when I noticed it I could not change it and I could not interpret it. [242]

It ought to be interpreted for the jury. I read it as 6,000 pounds, and that is what it shows on that basis.

Mr. Carr: We don't raise any question about it, your Honor. The decimal is to be ignored, I think.

The Court: All right.

Mr. Strong: That is all.

(Witness excused.)

Mr. Strong: Mr. Russell.

(Testimony of Richard C. Hartt)

Mr. Carr: Before that witness leaves, he was to find an extra signature card. And I wonder if he did it, your Honor?

The Court: Yes. Take the stand, please.

RICHARD C. HARTT,

a witness called by the Government, having been previously sworn, was recalled and testified further as follows:

Cross Examination.

By Mr. Carr:

Q. Did you find the other signature card?

A. I haven't finished the investigation as yet.

Mr. Carr: I guess that is all, then.

The Court: When will you—

The Witness: I will make sure that it is through today.

The Court: Do you feel you can finish it by 2:00 o'clock?

The Witness: I could have it by 2:00 o'clock. [243]

The Court: All right, thank you.

Mr. Carr: Just one other question:

Q. I might ask you, this Exhibit No. 2, Government's Exhibit in evidence, and this signature card is dated March 17, 1943.

From your recollection, don't you recall that there was a signature card previous to that time?

A. Not to my recollection.

Mr. Carr: Well, then, you continue your search, if you please, sir.

The Court: He says he will have it at 2:00 o'clock, Mr. Carr.

(Testimony of Richard C. Hartt)

All right, that is all.

Mr. Strong: I have a question.

The Court: All right.

Redirect Examination.

By Mr. Strong:

Q. Have you found any signature card subsequent to that time? A. No, sir.

Mr. Strong: That is all.

(Witness excused.)

Mr. Strong: Mr. Russell. [244]

ROBERT A. RUSSELL,

a witness called by the Government, being first duly sworn,
was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Robert A. Russell.

The Clerk: "A"?

The Witness: Robert A. Russell.

Direct Examination.

By Mr. Strong:

Q. Mr. Russell, were you ever employed at the West Coast Supply Company?

A. I am employed at the West Coast Supply Company now.

Q. How long have you been employed there?

A. One month.

Q. Were you employed at any time before that at the address 1654 Long Beach Avenue?

A. I worked for the John H. Ziegler Company before the first of the year.

(Testimony of Robert A. Russell)

Q. Will you speak up?

A. I worked for the John H. Ziegler Company before the first of the year.

Q. Who employed you when you worked there?

A. Mr. Paul Ziegler.

Q. And when was that? [245]

A. Approximately nine months ago.

Q. You say you worked for the West Coast Supply Company for the last month?

A. The last month, yes, sir.

Q. Who employed you at the West Coast Supply Company? A. Mr. Raymond Ziegler.

Q. Will you state what happened; how you transferred from one job to the other?

A. Well, I left the John H. Ziegler Company to go to work for the West Coast Supply Company as a salesman.

Q. Tell us what happened. Were you asked to do that? Or how did you happen to do it?

A. Well, I—

Mr. Carr: I submit that is wholly immaterial.

The Court: Is it material?

Mr. Strong: I think it is, your Honor. I am laying the foundation.

The Court: You are asking him now about his employment of a month ago, and that would have nothing to do with the charge in the information.

It is just a month ago that he commenced to work for the West Coast Supply Company.

Mr. Strong: I shall leave those questions at this time and ask some more later.

The Court: All right. [246]

(Testimony of Robert A. Russell)

Q. By Mr. Strong: I show you Government's Exhibit 15-A. The first document is a warehouse delivery advice, No. 31450, and ask you if that is your signature on there? A. That is my signature.

Q. And are those words "West Coast Supply Co." yours? A. Yes, sir.

Q. You wrote that on this? A. Yes, sir.

Q. Was that written on or about the date shown here: July 1st or 2nd, 1946?

A. Well, I couldn't say that.

Q. You just examine it and see if you can.

Q. That is the date on the receipt; so that is undoubtedly the time that I signed it.

Q. Did you receive the sugar that was shown there by that receipt? A. I undoubtedly did, yes.

Q. And that was at 1654 Long Beach Avenue?

A. Well, 1654—no, I wouldn't say it was 1654.

Q. Where did you receive it?

A. Well, I received it in the John H. Ziegler Company in the entrance to that warehouse.

Q. Where is that?

A. That would be on the north side of the West Coast Supply Company. [247]

Q. Part of the same building?

A. Well, it is in the same vicinity, yes.

Q. Well, isn't it an attached building?

A. Well, it is on the same lot, I mean more or less. There are several different properties there. I don't know whether you would call it the same building or not.

Q. Are they physically connected?

A. Physically connected, yes.

(Testimony of Robert A. Russell)

Q. Where is the office of the West Coast Supply Company? In which building is that?

A. 1654 Long Beach Avenue.

Q. Where is the office of this so-called John H. Ziegler Company?

Mr. Carr: I object to this.

The Court: "So-called"?

Mr. Carr: To "so-called."

The Court: I do not think that is proper.

Mr. Strong: I will take out "so-called."

Q. Where is the office of the John H. Ziegler Company?

A. Well, that is approximately—I would have to say approximately because I don't know the exact address. I would say it is about 57 or 59.

Q. Is there an office in there? A. Yes, sir.

Q. When you received the sugar shown by Government's [248] Exhibit 15-A, you were working for what company, you say? A. John H. Ziegler Company.

Q. How did you happen to write "West Coast Supply Co." on that receipt?

Mr. Carr: I submit he is calling this man as his own witness and cross examining him.

The Court: No, he is just asking him to explain an exhibit, counsel.

Mr. Carr: Very well.

The Court: Oh, no.

The Witness: When you receive something from any company, you sign as to the company it's made out to. The receipt reads "sold to West Coast Supply Co.," so that is naturally the way the truck driver would want it signed.

(Testimony of Robert A. Russell)

Q. By Mr. Strong: That is the way you signed it?

A. That is the way I signed it because that is the way the receipt was made out.

Q. So far as you know, who are the owners of the West Coast Supply Company?

A. Well, to my knowledge, Raymond Ziegler and Allan Ziegler and, I believe, their father.

Q. Who are the owners of the John H. Ziegler Company?

A. Well, to my knowledge, the only one I have ever had contact with is Mr. Paul Ziegler.

Q. Mr. Paul Ziegler? [249]

A. What did you ask me, sir?

Q. Who the owner was of the John H. Ziegler Company?

A. Well, Mr. Ziegler. Mr. Paul Ziegler is the only one I have had contact with. I don't know what the personal relationship is there, sir.

Q. Yes. Do you know whether Mr. Paul Ziegler is the brother of the other Zieglers that you mentioned?

A. So far as I know.

Q. So far as you know it is what?

A. That he is a brother, I imagine. They have the same name.

Q. I show you Government's Exhibit 17 in evidence. You see on the first sheet it says here "West Coast Supply Co.—per Robert A. Russell." A. I see that.

Q. Did you write that on there?

A. That is my signature.

Q. How about the words "West Coast Supply Co."?

A. That is my writing.

(Testimony of Robert A. Russell)

Q. You wrote that about the date shown on the receipt?

A. Well, that is the date there. I imagine that is when I wrote it.

Q. Yes. August 20, 1946?

A. August 20, 1946.

Q. That is the time you received that sugar? [250]

A. I imagine it was around that date. I mean I can't recall the exact date when I received it.

Q. And look at this third page of Government's Exhibit 17, which is a delivery record of the Marr Freight Transit, Inc., No. 3920.

Do you see the words "West Coast Supply Co. by Robert A. Russell"? Did you write that on there?

A. That is my signature.

Q. Yes. How about the words "West Coast Supply Co."?

A. That is my writing.

Q. And you received the sugar on or about the date shown on the receipt?

A. I imagine. I mean I am not sure about dates because, I mean, over that period of time—

Q. But you received that sugar?

A. I undoubtedly did, yes.

Q. You would not sign it if you did not?

A. No, I wouldn't sign.

Q. I show you the next exhibit, which is Government's Exhibit 17, which is the record of Marr Freight Transit, Inc., No. 3926, and ask you whether you wrote the words "West Coast Supply Co. by Robert A. Russell"?

A. How is that?

Q. These words (indicating).

A. You mean that is my signature there? Yes. [251]

(Testimony of Robert A. Russell)

Q. And above it you wrote "West Coast Supply Co."?

A. Yes.

Q. And you got that sugar on about the date shown on the receipt?

A. If that is on the receipt, I imagine I did. I mean I can't recall, I mean what I received at that time.

Q. Do you sign receipts without getting the items shown? A. No.

The Court: He answered that, and he said undoubtedly he would not sign unless he got the sugar.

Q. By Mr. Strong: I show you as part of Government's Exhibit 17 the delivery record of the Marr Freight Transit, Inc., No. 3937. That has the words "West Coast Supply Co. by Robert A. Russell" on the bottom.

Did you write those words?

A. Well, that is my signature and that is my writing.

Q. The words "West Coast Supply Co."?

A. That is my writing.

Q. You received this sugar, too?

A. Well, I undoubtedly did. I mean—

Q. I show you the next part of Government's Exhibit 17 which is the delivery record of Marr Freight Transit, Inc., No. 3683, signed "West Coast Supply Co. by Robert A. Russell." A. That is my signature.

Q. And "West Coast Supply Co." you wrote? [252]

A. That is my writing.

Q. The next receipt, part of Government's Exhibit 17, is delivery record No. 3691 of Marr Freight Transit, Inc. Did you write the words "West Coast Supply Co. by Robert A. Russell" on the right-hand corner?

A. That is my writing.

Q. You got the sugar? A. I imagine.

(Testimony of Robert A. Russell)

Q. I show you as part of Government's Exhibit 17 delivery record No. 3601 of Marr Freight Transit, Inc.

On the right-hand side it says in writing "West Coast Supply Co. by Robert A. Russell."

Did you write that? A. That is my writing.

Q. I show you—

Mr. Carr: Louder, please, Mr. Witness.

Mr. Strong: Beg pardon?

Mr. Carr: A little louder.

Mr. Strong: Would you speak up a little louder?

The Witness: That is my writing.

Q. By Mr. Strong: I show you the next three pages of Government's Exhibit 17, each of which there is in the right-hand side the words "West Coast Supply Co." written in "by Robert A. Russell."

Now, will you state whether you wrote all those three?
[253] A. This one isn't very clear.

Q. Well, examine it.

A. That looks like my writing. I can't tell about that one. I am not sure.

Q. Just look at it a little more carefully.

A. It looks like my name, but I mean I couldn't say for sure on the "West Coast Supply Co."

Q. But the name looks like your name?

A. The name looks like mine.

Q. All right. I show you Government's Exhibit 20, which consists of two shipping orders and freight bills, both of which have on them the words "West Coast Supply Co. by Robert A. Russell."

You see it is on the left-hand side on the first one, which is "No. P-177" printed, and the next order is

(Testimony of Robert A. Russell)

"P-125". And on the right-hand side it says "West Coast Supply Co. by Robert A. Russell."

Did you sign those? A. That is my writing.

Q. Both the "West Coast Supply Co." and the name?

A. Yes, sir.

Q. I assume you received that sugar shown by these receipts? A. I received it if I signed for it.

Q. I show you Government's Exhibit 19 in evidence, [254] which consists of two freight bills of the Valencia Truck Co., each of which has in the right-hand side under "Received . . ." in pencil the words "West Coast Supply Co. by Robert A. Russell."

Did you write that in both instances?

A. That is my writing.

Q. I show you Government's Exhibit 14 in evidence, and I show you the delivery receipt which is No. R-02917. It says "West Coast Supply Co. by Robert A. Russell."

Did you write that? A. That is my writing.

Mr. Carr: Mr. Strong, it would be all right if you just let him look at all of them and make a statement. It will save time.

Mr. Strong: Fine!

The Witness: This second one isn't mine.

Q. By Mr. Strong: That is delivery receipt of Union Terminal Warehouse No. R-04877.

You don't know who wrote that?

A. No. That isn't mine.

Q. All right. Go ahead.

A. There are only three here that are mine. The rest are not.

Q. Will you indicate which three, please?

A. That one there is my writing. [255]

(Testimony of Robert A. Russell)

Q. That is delivery receipt No. R-02917, is that right?

A. Yes. That is not mine (indicating).

Q. That is delivery receipt R-04877.

You don't know whose writing that is?

A. No. That is not ours.

Q. That is not yours, you mean?

A. I mean it is not mine.

Q. Delivery receipt No. R-02812: is that your writing?
A. That is my writing.

Q. Delivery receipt No. S-01651?

A. That is my writing. That is not, I mean there (indicating).

Q. Delivery receipt R-02916 has not any of your writing?
A. No.

Q. Delivery receipt S-00743 is your writing?

A. That is my writing.

Q. Is that right? A. Yes.

Mr. Strong: That is all.

The Court: Just a minute.

Mr. Strong: One more question. May I ask one more question?

Q. In connection with the sugar which is shown by the receipts on which you say appears your writing, when that sugar was received by you did you give to the driver any ration [256] coupons or ration checks or any ration currency of any kind?

A. That wasn't—I mean I was just the receiving clerk, sir.

Q. I just want to know whether you did or you did not.

A. No, I wouldn't handle anything like that.

Mr. Strong: That is all. Cross examine.

(Testimony of Robert A. Russell)

Cross Examination.

By Mr. Carr:

Q. Mr. Russell, directing your attention to Exhibit No. 17, I notice all of these you say you received.

Well, the first one says "received from Overland Terminal Warehouse" and up at the top it is "Marr Freight Line."

Are you familiar enough with the business to know that this sugar had been stored there at the Overland Terminal Warehouse?

A. You mean where it was stored there, sir?

Q. Yes, where the two companies have storage? They use that company, don't they, the Overland Terminal Warehouse?

A. The Overland Terminal Warehouse is a storage warehouse, to my knowledge.

The Court: Sir?

The Witness: The Overland Terminal Warehouse is a storage warehouse, to my knowledge.

Q. By Mr. Carr: So that both the John H. Ziegler Company [257] and the West Coast Supply Company stored various and sundry articles at that terminal?

A. I believe so, sir.

Mr. Strong: I object to that, your Honor, unless he knows.

The Court: Lay a foundation, Mr. Carr.

The Witness: I mean—

The Court: Wait a minute.

The Witness: Pardon me, sir.

The Court: Lay a foundation, Mr. Carr.

Mr. Carr: Well, I won't waste the time if counsel wants to be that technical.

(Testimony of Robert A. Russell)

Mr. Strong: I don't want to be technical; but if the man knows, I should like to know if he does.

The Court: Mr. Carr says he does not want to waste the time of the court.

Mr. Carr: I think the exhibit probably speaks for itself.

The Court: I think so. All right.

Q. By Mr. Carr: Now, Mr. Russell, when did you first start to work for the John H. Ziegler Company?

A. I believe it was April of last year, sir.

Q. A. April of 1946?

A. I mean it was approximately around there. It might have been March. It was either the end of March or right around the first of April, right in that vicinity there.

Q. The John H. Ziegler Company is run or operated there by Mr. Paul Ziegler, is it not? [258]

Q. He is the one in charge and the one you took orders from, is that right? A. Yes, sir.

Q. Now, when you were working for the John H. Ziegler Company you had business with the West Coast Supply Company, did you not? A. Yes, sir.

Q. Were you around the office of the West Coast Supply Company?

A. If I was just in that vicinity, sir, I mean if I happened to walk in the office.

Q. There are two offices there, are there not?

A. Yes, sir.

Q. One is the West Coast Supply Company?

A. Yes, sir.

Q. And the other is the John H. Ziegler Company office? A. Yes, sir.

(Testimony of Robert A. Russell)

Q. There is a large building, maybe two or three buildings on that property, is that right?

A. Yes, sir.

Q. And there is a manufacturing establishment?

A. Yes, sir.

Q. That is run by the John H. Ziegler Company, is it not?

A. Yes, sir.

Q. Or was at that time? [259]

A. It was, I mean when I worked there, sir.

Q. Now, I believe there is Raymond and Allan Ziegler who are the partners of the West Coast Supply Company?

A. Yes, sir.

Q. And Allan is the managing partner?

A. I believe so, sir.

Q. From your own knowledge don't you know, Mr. Witness, that they are two separate companies?

A. Yes, sir.

Mr. Strong: I object to that, your Honor.

The Court: No, you opened the question. He has the right to go into it.

Mr. Strong: May I have the witness qualified further? I don't know that he is competent to say.

Mr. Carr: I submit, your Honor, I am cross examining him.

The Court: That is right. You have that right, and you may go into that on further examination.

Mr. Carr: I think that is all.

Redirect Examination.

By Mr. Strong:

Q. How do you know that they are two separate companies?

(Testimony of Robert A. Russell)

A. Well, only from the knowledge, sir, that I have worked for both.

Q. But you don't know what their internal arrangements are, do you? [260]

A. Well, I don't quite understand that, sir.

Q. You are not working in the office, are you?

A. No, sir. At the present time I am a salesman for the West Coast Supply Company.

Q. Before that you were working there?

A. For the John H. Ziegler Company.

Q. What were your duties?

A. What were my duties for the John H. Ziegler Company?

Q. Yes.

A. I was receiving clerk, and I was assistant to the superintendent.

Q. You don't know what arrangements there are between the various partners and other persons, do you?

A. Well, only from my knowledge, sir. I mean I had nothing to do with the West Coast Supply Company when I was working for the John H. Ziegler Company.

Q. But you don't know what arrangements there are between the partners, do you?

A. Well, I mean that is more or less personal, sir. I don't know what the—

Q. By the way, do you have a social security card?

A. I don't believe I have it with me, sir. But I have one.

(Testimony of Robert A. Russell)

Q. Do you have it with you?

A. No, sir. [261]

Q. Would you bring it back this afternoon?

A. All right, sir.

Q. For the year 1946, please.

Mr. Carr: I submit that bringing this man back for a social security card—what is the purpose of asking for the social security card?

Mr. Strong: I don't believe I have to state to counsel what my purposes are, your Honor. These are my witnesses, and I can conduct the trial in my own way.

Mr. Carr: There is a business down there, your Honor; and this business of dragging people back and forth is quite a nuisance.

The Court: I think this is the only request the Government has made.

Mr. Carr: Very well.

The Court: You have made several, and I have granted them all. Proceed.

Mr. Strong: That is all.

The Witness: Is that all?

Mr. Strong: Bring back the card this afternoon.

The Witness: All right, sir.

(Witness excused.)

Mr. Strong: Mr. Young. [262]

LOMAX YOUNG,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Lomax, L-o-m-a-x, Young, Y-o-u-n-g.

The Court: I am sure that we do not have that name.

The Clerk: L-o-m-a-x, the first name.

The Court: And the last name?

The Clerk: Y-o-u-n-g.

Direct Examination.

By Mr. Strong:

Q. What is your occupation, Mr. Young?

A. I am an investigator.

Q. For whom?

A. The Office of Price Administration.

Q. How long have you had that job?

A. Since the middle of May, 1945.

Q. Were you an investigator with the Office of Price Administration in July and August, 1946?

A. Yes, sir.

Q. Did you have occasion at any time during July or August, 1946, to go to the premises at 16- —

Mr. Carr: -54.

Mr. Strong: Thank you, sir. [263]

Q. —1654 Long Beach Avenue?

A. Yes, sir.

Q. Did you go there on official business in connection with the Office of Price Administration?

A. Yes, sir.

Q. Were you alone? A. No, sir.

(Testimony of Lomax Young)

Q. About what date was it that you went?

A. As near as I can recall, it was, I think, around August the 22nd.

Q. Of what year? A. Of 1946.

Q. Who was with you?

A. Special Agent Pruitt, two accountants from the auditing department, one by the name of Penrod, and I don't recall the other auditor's name.

Q. Speak up, please. I heard that, but speak up from now on.

Who else?

A. Special Agent Gould.

Q. Did you arrive on those premises during business hours? A. Yes, sir.

Q. Did you ask for anyone there?

A. Yes, sir. I asked for Allan Ziegler and Raymond [264] Ziegler the first time.

Q. Did anyone come forth?

A. Yes, sir, Allan Ziegler—both Allan Ziegler and Raymond Ziegler.

Q. Did you make any request upon either or both Allan and Raymond Ziegler.

A. I had an official document of the Office of Price Administration which my supervisor requested.

The Court: Not what your supervisor requested.

Q. By Mr. Strong: Did you have a document?

A. Yes, sir.

Q. What did you do with it?

A. I served one on Allan Ziegler and one on Raymond Ziegler.

(Testimony of Lomax Young)

Q. What do you mean "served"?

A. I presented it to him.

Q. I see. Did you make any request upon Allan or Raymond Ziegler?

Mr. Carr: That is all objected to as being wholly immaterial, not binding on either of these two defendants, your Honor.

Mr. Strong: I shall connect it up.

The Court: All right, proceed.

The Witness: As I recall, the document—

The Court: No. Listen to the question. [265]

(Question read by the reporter.)

The Witness: Yes, sir.

Q. By Mr. Strong: Was that orally or by means of the document? A. By means of the document.

Mr. Strong: May I have this marked for identification as Government's Exhibit next in number? It consists of three sheets.

The Clerk: Government's Exhibit 37 for identification.

Mr. Strong: Make that one sheet, your Honor.

The Court: 37.

Have you shown it to counsel?

Mr. Strong: I am going to show it to him right now. (Handing document to counsel.)

Mr. Carr: All right.

Q. By Mr. Strong: I show you Government's Exhibit 37 for identification and ask you whether this is the document to which you referred?

Mr. Carr: Now, if the court please, at this time I am going to ask your Honor to read that document.

(Testimony of Lomax Young)

The Court: Not just yet. He is just getting it identified. If the witness should say no—

Mr. Carr: Very well, your Honor.

The Court: —there would be no objection.

Just answer that yes or no. [266]

The Witness: Yes.

The Court: The next question?

Mr. Carr: Now, your Honor—

The Court: Wait until the next question.

Q. By Mr. Strong: Did you have any conversation with either Paul or Raymond Ziegler in connection with that document? A. Yes.

Mr. Carr: I object to that as being wholly immaterial and not binding on the defendants in this case. It is leading toward prejudicial matter.

Mr. Strong: I will connect it up.

The Court: Let me see it. (Document handed to the court.)

Mr. Strong: I may say, your Honor, that I do not intend to offer the document. This is only a foundation for the next question.

The Court: What is the question?

(Question read by the reporter.)

Q. By Mr. Strong: During this conversation did either Paul or Raymond Ziegler state to you, rather did either Allan or Raymond Ziegler state to you the capacity of Paul Ziegler?

Mr. Carr: Now, just a moment. We have mixed the three names up there, your Honor. He has used Paul; he has used Allan and he has used Raymond. [267]

I submit it is not fair to this defendant to have those names used.

(Testimony of Lomax Young)

The Court: Strike out the question and reframe the question.

Q. By Mr. Strong: During this conversation with either Allan or Raymond Ziegler did either or both of them make any statement as to the capacity of the defendant Paul Ziegler? A. Yes, sir.

Q. Will you state who said what? Just what was said about Paul, nothing else, no other details?

A. Allan Ziegler said that Paul Ziegler was the one who knew the most about the records requested in the document and that he would not show it, or would prefer not to comply with the request in the document except in the presence of Paul because, as I say, Paul was the one that I was to talk to about the document, and I asked him then if he was the manager and he said yes.

Q. Who was the manager? A. Paul.

Mr. Strong: May I have this marked for identification, your Honor?

The Court: Government's Exhibit 38 for identification.

Mr. Strong: In connection with this Government's Exhibit 38 for identification I want to state that I am not showing the witness the reverse side, and I should like to disregard it. [268]

May I physically strike it with a pencil, your Honor.
The Court: Yes.

Q. By Mr. Strong: I show you Government's Exhibit 38 for identification and ask you whether the signature "Raymond Ziegler" was placed on this document in your presence? A. Yes.

Q. Where did this happen?

A. At the office of the West Coast Supply Company.

(Testimony of Lomax Young)

Q. On what date? A. On August the 22nd.

Q. At the same— A. 1946.

Q. At the same occasion to which you just testified?

A. Yes, sir.

Q. You saw Raymond Ziegler sign that document?

A. Yes, sir.

Q. This written material here which precedes it—1, 2, 3, 4, 5, 6—7 lines; whose handwriting is that?

A. That is my handwriting.

Q. I don't think I heard you.

A. That is my handwriting.

Q. Then you gave that to Paul Ziegler?

A. Yes.

Q. And he signed it? A. Yes, sir. [269]

Mr. Carr: Just a moment, your Honor. Counsel is continually confusing those two names, and the record is going to be completely out of line.

Mr. Strong: May I strike that answer?

The Court: Yes.

Q. By Mr. Strong: Did you give this to Raymond Ziegler? A. Yes, sir.

Q. That is the only name that is on here "Raymond Ziegler"? A. That is the answer I intended.

Mr. Strong: Yes. I offer this in evidence, your Honor.

The Court: In evidence.

The Clerk: Government's Exhibit 38 in evidence.

Mr. Carr: Just a moment, Mr. Clerk, please.

I object to this on the ground it is irrelevant. It is immaterial. It is not binding on the defendant Paul Zieg-

(Testimony of Lomax Young)

ler, and it is raising a collateral issue which could work to the prejudice of both the defendants. It has no bearing whatsoever on the issues in the case, your Honor.

May I pass it up?

Mr. Strong: It has this bearing, your Honor: First it identifies the signature of Raymond Ziegler.

Secondly it is a statement signed by Raymond Ziegler as to Paul Ziegler. One of the questions in this case as has been brought out is what was the capacity of Paul Ziegler. [270]

I think that that is in proof of that question.

May I also state further, your Honor, that I will agree to striking out everything above the six lines that this witness says he wrote. I don't want that in the exhibit. It will have no purpose.

The Court: What evidenciary fact has the statement that he, in substance, desired to defer the report until Paul Ziegler was present? What evidenciary value has that?

Suppose it said that until Russell was present or someone else that had the records, or even a bookkeeper, what evidenciary fact is established by that, which is the only point I see in that part of this document?

Mr. Strong: If it said anything as to Russell, I would not be offering it because Russell is not one of the partners of these entities.

However, where one of the partners makes a statement that he wants to have the defendant Paul Ziegler before he does anything in connection with the records of that partnership, I think that that has weight in determining what role the defendant Paul Ziegler plays there, regardless of the fact of whether he is technically a partner or

(Testimony of Lomax Young)

not. I don't think it makes any difference because the connection of Paul Ziegler to these checks and these various other documents that purport to be drawn for West Coast Supply Company is one of the questions here. [271]

I think that any evidence of that kind coming through a partner, which establishes or helps to establish that, is proper evidence, your Honor.

The Court: But there is nothing in the document which refers to a partnership, is there, Mr. Strong?

Mr. Strong: Nothing as to the partnership. But it does indicate that one of the partners, Raymond Ziegler—

The Court: No, it does not indicate that. It just gives a name.

Mr. Strong: Pardon?

The Court: It just gives a name. It just gives "Paul Ziegler."

Mr. Strong: We have had testimony here that one of the partners is—

The Court: I am referring to this one instrument.

Mr. Strong: This instrument is signed by Raymond Ziegler.

The Court: That is the evidence here, unless there is some dispute.

Mr. Strong: And it tends to indicate, in my mind at least, that the party who signed it, Raymond Ziegler, is acting together with Paul Ziegler in various matters relating to the business of that company.

I think evidence of that kind is evidence in proof of the fact that that company is being operated, not only by the partners, whoever they may be, but that Paul Ziegler has an [272] active participation in running it.

(Testimony of Lomax Young)

Consequently, when other checks or documents are issued by Paul Ziegler in the name of the West Coast Supply Company, that is an act of the partnership, an act of an authorized agent, one whom they recognize themselves, as that document tends to indicate.

The Court: Frankly it does not seem to have much evidenciary value, counsel.

Mr. Strong: Well, to save time, I will withdraw it.

The Court: What?

Mr. Strong: I will withdraw it just to save time.

The Court: There is one portion I am going to permit in, and that is the signature of Raymond Ziegler which the witness testified to as written in his presence.

That part of it I shall permit in the record.

Mr. Carr: We don't object to that.

I would like to ask, though, if the exhibit is going to be put in evidence.

The Court: No, it is not going to go to the jury.

Mr. Carr: Very well, your Honor.

The Court: Mr. Cross, mark that "not to go to the jury."

The Clerk: Yes, your Honor.

Mr. Carr: Just the signature is to be considered.

Don't go away, Mr. Witness. I am through. [273]

Cross Examination.

By Mr. Carr:

Q. Mr. Young, how long have you been an investigator?

A. Since approximately the middle of May, 1945.

Q. You have been with the OPA all of that time, have you?

A. Yes, sir.

(Testimony of Lomax Young)

Q. You went down on this particular occasion, when you went there and talked to the Zieglers, for the purpose of trying to get a statement of some kind from them, did you not? A. Well, not necessarily.

Q. Well, you went down to get whatever evidence you could get against them? That is what you were down there for, is it not?

A. No, sir, not exactly. I was down there in connection with the OPA document.

Q. Now, is it not a fact that on the first occasion when you went down there—let's see; you had four other men with you, did you, on that first time?

A. You are referring now to the first time I went down there that I testified to?

Q. Yes, that is right. A. Yes, sir.

Q. Is it not a fact that at that time the only person you talked to was Allan Ziegler?

A. No, sir. [274]

Q. Did you talk to two men at that time, two Zieglers?

A. As I recall, I talked to Allan Ziegler and Raymond Ziegler. This was in the forenoon of August the 22nd.

The Court: Was that August 22nd?

The Witness: Pardon?

The Court: What was the date?

The Witness: August the 22nd, the date on that document.

Q. By Mr. Carr: That morning that you were down there did you not just talk to Raymond Ziegler, Mr. Young, alone? He was the only Ziegler there, was he not?

(Testimony of Lomax Young)

A. That may have been the case. I am certain of talking to Raymond in the morning.

Q. Now, you came back that afternoon?

A. After lunch, yes, sir.

Q. At that time you talked to some other Ziegler. Now, what Ziegler did you talk to at that time?

A. I talked also to Raymond Ziegler. I believe, as I recall, I talked to Allan Ziegler; and I talked to Paul Ziegler.

Q. Is it not a fact that at that time, both in the morning and in the afternoon, that you were told by Mr. Raymond Ziegler that Paul Ziegler was an attorney and was handling their legal business?

A. No, sir, that is not true.

Q. It was not even mentioned that Paul was an attorney? [275]

A. That was mentioned.

Q. That was mentioned?

A. That is correct.

Q. You know, of course, that he was the attorney for the company at that time, did you not?

A. I had understood that he was an attorney but not for the company.

Q. Had you previous to going down there gone over the OPA records to ascertain the facts concerning the West Coast Supply Company?

A. I don't know just what you mean by ascertaining the facts.

Q. I mean did you make a preliminary check of your files prior to going down to the office of the West Coast Supply Company?

A. I had seen the files of the West Coast Supply Company prior to going down there, if that is what you mean.

(Testimony of Lomax Young)

Q. As a matter of fact, you had looked at the registration certificates of the West Coast Supply Company before you went down there that day, had you not?

A. By "registration certificates" just what documents do you mean?

Q. Well, I can give you the form numbers.

A. That will help.

Q. Well, how about R-305? [276]

A. Yes, sir, I had seen that.

Q. You had seen R-210?

A. That I couldn't be sure of.

Q. Well, you knew at the time you went down there that the certificate showed that the West Coast Supply Company had three partners, did you not?

A. I knew that the form R-305 so indicated.

Q. You knew that it showed that Paul Ziegler was not a partner, did you not?

A. No, sir. That R-305, I believe, was dated April 28, 1942.

Q. You knew at the time you went down there to make this contact at Ziegler's that the application or registration forms in the OPA files disclosed that the West Coast Supply Company was composed of John H. Ziegler, Allan Ziegler and Raymond Ziegler? You knew that, did you not?

A. No, sir. The only way I would know that, I know that the files, form R-305, indicates that that was the case on the date that was filled out. But on the date I went down there, I would have no idea from that file what the situation was at the present time.

(Testimony of Lomax Young)

Q. Just for a moment I should like to clear up one point, Mr. Young.

Are you sure it was Raymond Ziegler that you talked to in the morning? [277]

A. Yes, sir. It was in the morning that he signed the statement that—

Q. Is this it (indicating)?

A. That was in the morning.

Q. That was in the morning. When you came back that afternoon Mr. Paul Ziegler and Allan Ziegler themselves came back from somewhere up town and found you there when they got there, is that not right?

A. I got back there a little earlier than Paul did. He returned with some gentlemen, and I didn't notice. I couldn't say offhand whether the other gentleman was Raymond Ziegler or not when they returned. I was outside the building.

However, I did see them both in the afternoon, if that is what you mean.

The Court: When you say "both" to whom do you refer?

The Witness: Raymond and Paul.

Q. By Mr. Carr: During the morning, now, you had no talk with Raymond?

A. Yes, I had no talk with Raymond during the morning.

Q. I mean Allan. You had no talk with Allan in the morning? A. I couldn't say for sure as to that.

Q. Who was present? Just repeat who was present at the times that Raymond is supposed to have said, or Allan, anything about what Paul's capacity was at the plant. [278]

(Testimony of Lomax Young)

A. To the best of my recollection, it was special agent Pruitt, special agent Gould, and I think the accountant, Mr. Penrod, and the other accountant whose name I don't recall. I believe the two accountants were also present.

Q. Where were you? What part of the premises?

A. There is a counter in their front office. We were on the outside of the counter, and Raymond Ziegler was on the inside.

Q. Where was Allan? A. Allan?

Q. In the afternoon? I am talking about the afternoon now.

A. At whichever time I talked to Allan, he was on the opposite side of the counter from me.

Q. Well, which time was it that you talked to Allan?

A. I don't recall exactly which time, whether it was in the morning or the afternoon.

Q. Who was present besides the agent? Don't repeat those. It is not necessary to go over that.

A. I can't recall whether Raymond was present all the time I talked to Allan or part of the time or any of the time. They kept switching back and forth from the counter to various other offices at one time or another. While I was engaged in conversation with one particular one, I had no opportunity of noticing particularly whether or not the other one was present [279] or whether he had just left or just come back.

Q. Well, now, what was the statement again and who was it that made the statement about Paul's relationship with the business? A. It was Raymond Ziegler.

Q. When was that made?

A. The statement that he wouldn't show me the records, except in the presence of Paul, was made in the

(Testimony of Lomax Young)

morning; and in the afternoon conversation with him when he was confronted with the circumstance of Paul being present, he told me then that he wouldn't show me those records on advice of his attorney.

I asked him who his attorney was. He said he hadn't selected one yet.

I told him apparently I misunderstood. I was confused. I didn't understand what he meant that he wouldn't show me the records on advice of his attorney who he hadn't even selected yet.

He said, "Well, what I mean is I won't show you the records until I talk to my attorney."

I asked him if his attorney was William Handy. He said no. Or whether it would be William Handy, and he said he didn't think so. I asked him if the attorney would be Abe Gottfried. He said he didn't think so. I asked him if his attorney would be Paul Ziegler, and he very definitely answered [280] no.

Q. You did know at that time, then, that Paul was an attorney?

A. I had heard that Paul Ziegler was an attorney. I don't know of my own knowledge yet.

Q. You seem to remember those names very well, the names of those attorneys.

I wish you would refer to something. You keep records, do you not? A. Of what?

Q. Of your interviews? A. Not necessarily.

Q. Don't you make notes? A. Occasionally.

Q. Do you have the notes for that day? I don't want to see them now. I just want to know if you have the notes.

(Testimony of Lomax Young)

A. I don't recall that I made notes that day, other than the statements that were written in my handwriting here.

Q. Generally, though, after a day's work you write up a report or make some notes so that you will know what you did on that day; is that not right?

A. Occasionally.

Q. It is the general practice in the OPA, is it not, the same as in the FBI?

A. I wouldn't know about the general practices in other [281] agencies.

Q. You depend on your memory, then, to recall these incidents back months past when you come up to testify on a case?

A. Well, the identity of these attorneys was a rather simple matter, inasmuch as William Handy had formerly been the chief litigation attorney of the Enforcement Division at OPA, and I knew him personally. Abe Gottfried had formerly been an attorney with OPA. I had had occasion to become acquainted with him through various matters in connection with the OPA.

Prior to my going down for this conversation there had been a suspension order proceeding before the Hearing Commissioner, and Abe Gottfried represented West Coast then.

Mr. Carr: Your Honor, I don't think we need to go into that.

Mr. Strong: I will agree to strike that.

The Court: All right.

Q. By Mr. Carr: You did not mention my name to him, did you?

A. No, sir. I had never met you, sir.

(Testimony of Lomax Young)

Mr. Carr: That is all.

The Court: Any questions?

Mr. Strong: Just one more question. [282]

Redirect Examination

By Mr. Strong:

Q. Did you ask Raymond Ziegler at any time who was managing the West Coast Supply Company on that day? A. I—

Mr. Carr: That certainly is a leading question, your Honor, as to one of the very specific issues involved. I do not think counsel ought to express it so that a yes or no answer is the situation.

The Court: No. I think Mr. Carr is correct in that.

Mr. Strong: I won't ask that question at all. Just strike that. That is all.

The Court: All right.

(Witness excused.)

Mr. Strong: Mr. Gould.

The Court: For the record, what is Mr. Gould's full name?

Mr. Carr: Before he comes, may I move to strike the testimony of the previous witness on the ground it is not material to the issues in the case and can be prejudicial to both defendants.

The word used, as I recall, was "managing."

That does not indicate a partner. Some man could be hired to be a manager.

The Court: I think that is a matter of argument. Motion [283] denied.

CHARLES E. GOULD,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Charles E. Gould, G-o-u-l-d.

Direct Examination

By Mr. Strong:

Q. What is your occupation, Mr. Gould?

A. Special agent for the Office of Temporary Controls, Office of Price Administration.

Q. Were you so employed by the Office of Price Administration in July and August, 1946?

A. In August, 1946.

Q. Directing your attention to August 22nd, on or about August 22, 1946, did you, in company with any other agents of the Office of Price Administration, have occasion to go to the premises of the West Coast Supply Company?

A. Yes, sir, I did.

Q. How many times did you go there that day?

A. Twice.

Q. Now, can you give us the names of the persons you went with? [284]

A. Yes, sir. There was Mr. Pruitt, Mr. Young; and I don't know the names of the other two gentlemen. They were auditors from the district OPA office.

Q. Mr. Young of the Office of Price Administration?

A. Yes, sir.

Q. Mr. Pruitt?

A. Mr. Pruitt, a special agent.

(Testimony of Charles E. Gould)

Q. Did either you or any of the other agents who were with you see or speak to any of the Zieglers on the premises of the West Coast Supply Company the first time you went there on August 22nd?

A. Yes, sir.

Q. What time was that, about?

A. About 11:30 in the morning.

Q. Who was there of the Zieglers that you spoke to?

A. One of us talked to Raymond Ziegler.

Q. Now, without going into any of the reasons why you were there, or anything else, will you state whether Raymond Ziegler made any statement to you or in your presence as to the capacity of the defendant, Paul Ziegler, in connection with the West Coast Supply Company?

A. I heard Raymond say to Mr. Young that he would have to present the inspection audit to Paul Ziegler because he was the one that handled the sugar account and that he was actually doing the managing of the place.
[285]

Mr. Strong: That is all.

Mr. Carr: I move to strike the testimony as being immaterial, your Honor, to the issues in the information.

The Court: Overruled.

Mr. Carr: That is all. No questions.

(Witness excused.)

Mr. Strong: Mr. Loud.

THADDEUS R. LOUD,

a witness called by the Government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Thaddeus R. Loud.

The Clerk: L-o-u-d?

The Witness: Yes, sir, T-h-a-d-d-e-u-s.

Direct Examination

By Mr. Strong:

Q. What is your occupation, Mr. Loud?

A. I am the assistant special agent in charge of the Division of Special Investigations of the Office of Price Administration.

Q. Were you employed by the Office of Price Administration in that or any other capacity during 1946?

A. Yes, sir. [286]

Q. What capacity were you employed in during the beginning of 1946?

A. Special agent, the same division.

Q. During the early part of 1946 did you have occasion to discuss any matters with reference to the sugar rationing account of the West Coast Supply Company with any of the Zieglers?

A. Yes, sir.

Q. Which one? A. Paul J.

Q. Is that the defendant? A. Yes, sir.

Q. Where did this discussion take place?

A. In my office at 1031 South Broadway.

Q. Who was present?

A. Jack Foster, who was then the agent in charge, and Jona H. Taylor, who was his assistant, and myself.

(Testimony of Thaddeus R. Loud)

Q. Was Mr. Paul Ziegler there? A. Yes, sir.

Mr. Carr: What is that date? Did he give a date?

Q. By Mr. Strong: What was the date?

A. The best that I can recall, it would be around the first week or first 10 days of February, 1946.

Q. What was the purpose of this discussion with Mr. Ziegler? [287]

Mr. Carr: I am going to object to this. The date shows it is in February, 1946, several months before any alleged charge in the information, your Honor.

Any discussion with this defendant at that time would certainly have no bearing on the issue in this case.

The Court: Unless to show knowledge of the regulation, is all.

Mr. Strong: And willfulness, your Honor.

The Court: That is the only part. That must be established by the Government.

Mr. Carr: Well, if that is the point—

The Court: Yes, if it goes further than that, I shall entertain a motion to strike because it is antecedent to the offense charged.

Mr. Carr: I think counsel should state his purpose on a thing like that.

Mr. Strong: Shall I approach the bench, your Honor?

The Court: No, it is not necessary. Proceed.

(Question read by the reporter.)

The Witness: To ascertain the amount of sugar the West Coast Supply Company had received and was receiving at that time.

Q. By Mr. Strong: During this conversation with Paul Ziegler was there anything said about overdrawing

(Testimony of Thaddeus R. Loud)

of the sugar ration account of the West Coast Supply Company? [288] A. Yes, sir.

Mr. Carr: I object to this as being outside the issues charged in the information.

The Court: Yes, I do not believe that part of the testimony is competent, unless the defendant's attention was called to some particular regulation with reference to the sugar ration.

Mr. Strong: If your Honor please, I think that a lot of times an objection and answering might be saved if counsel and I could approach the bench and I could state to your Honor specifically what the testimony will be so that your Honor can judge in full.

The Court: It may take a little more time, but I think you had better just proceed this way and ask the questions, Mr. Strong.

Mr. Carr: Well, now, did you rule on my objection, your Honor?

The Court: Yes, I sustained that. I suggested to counsel that if there are any matters that pertain to bringing home to the defendants knowledge as to the regulations at that time, sugar rationing, and so forth, that that is admissible; but that would be a different offense. I do not say there was. Maybe there was not any offense at all. There is not any evidence that there was an offense prior to July 1, 1946, alleged in this information. [289]

However, any knowledge or statement made with reference to regulations to the defendant at that time will be permitted.

Mr. Strong: May I be heard further?

(Testimony of Thaddeus R. Loud)

The Court: Yes.

Mr. Strong: I should like to offer it for a more extended purpose.

I think that the knowledge of the regulations is presumed since they are published in the Federal Register. My purpose is to show willfulness on the part of this defendant.

The Court: Yes, certainly. I have already stated that.

Mr. Strong: I am sorry. I thought your Honor was restricting it.

The Court: Oh, no.

Q. By Mr. Strong: Did the defendant, Paul Ziegler, make any statement or indicate in any way how he intended to obtain sugar after his ration account had been depleted?

Mr. Carr: Now, just a moment. That is assuring something that is not in evidence, saying that after the ration account was depleted; secondly, it is inquiring as to a time that is far antecedent to this information, and it certainly is going to work to the prejudice of this defendant if we get off into collateral issues. Then we will have to determine whether he violated some other regulation, your Honor.

The Court: Let me make it clear again.

Any knowledge brought to the defendant with reference to the regulations, or anything that he said with reference [290] to his attitude towards those regulations, is admissible. I am excluding any testimony at all with reference to an alleged overdraft or anything else that there might have been prior to July 1, 1946.

I think that that is very clear. The Government must show willfulness in this matter. All right.

(Testimony of Thaddeus R. Loud)

Mr. Strong: What is your Honor's ruling?

The Court: Read it.

(Record read by the reporter.)

The Court: Does that clear it up?

Mr. Strong: I am sorry. I do not understand your Honor's ruling on the question because it is my purpose to show willfulness by language of the defendant at that time.

The Court: I said you could. Now, I shall keep repeating it, Mr. Strong, if you want me to.

Read it again to Mr. Strong.

(Record read by the reporter.)

The Court: Now, that is the statement: the Government must show willfulness. That is what you asked me, and I repeat it again:

Any evidence you have of wilfullness will be admitted.

Mr. Strong: I apologize, your Honor. I did not understand that.

The Court: That is all right.

Mr. Strong: Will you please read the question to the [291] witness?

Mr. Carr: That is the question I am objecting to.

The Court: Overruled. Proceed.

Mr. Carr: Well, your Honor, I think you want to hear that question again. It is presuming something that is not in evidence.

The Court: It has been limited to what I have said.

Mr. Carr: Yes. The question is formulated where it is assuming something not in evidence. If your Honor wants to pass it without hearing it again, naturally you will do so.

(Testimony of Thaddeus R. Loud)

The Court: The witness understands, I think, with the admonition that I have given as to any statement that has been made.

Now, it is very clear; and that is the question. I understand it is limited to that.

Well, that may be stricken out and reframed.

Q. By Mr. Strong: Did the defendant Paul Ziegler make any statement or indicate in any way how, if in any manner, he intended to obtain sugar in the event that his account was depleted.

Mr. Carr: Well, now, that certainly is objected to upon the basis it is based on a contingency. There is no foundation showing any contingency existed. It is prior to the time of the information.

The Court: Give the conversation between yourself and Paul Ziegler. [292]

Mr. Carr: May I respectfully object to that?

The Court: Overruled.

Mr. Carr: On the ground it is going to lead into—

The Court: I am trying to get to the issues, and you have objected to all of those questions. I want the conversation. Go ahead.

The Witness: We asked Mr. Ziegler how it was that a number of ration checks had been returned to the OPA, all signed by a certain person.

Mr. Carr: Now, if the court please, it is obvious to me that counsel is trying to prove what is known as similar offenses, apparently. And he is leading into a collateral issue, another investigation; and it is going to certainly develop prejudicial testimony in this case.

The Court: He can show intent, can he not, counsel?

(Testimony of Thaddeus R. Loud)

Mr. Carr: He can show intent, but if he is going to bring in collateral offenses or alleged offenses, he cannot do it that way.

Mr. Strong: I am not seeking to bring in the fact of any collateral offenses, and I should like to state to the witness that he is not to go into any other offenses; merely to answer the question as to the conversation with reference to the facts in the case.

The Witness: Well, Mr. Ziegler informed us that he felt that the sugar rationing was going off and that he was going [293] to get sugar one way or the other, and his allotment period in January was like other allotment periods: he was short of sugar, and inasmuch as the meat rationing and gasoline, processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory, he felt that the same would happen to sugar. And he was going to get it one way or the other.

We informed him that sugar rationing was not off and that anything he did contrary to the regulations would not be legal.

He replied that he was not going to be caught short and he was going to build up his inventory in case the sugar rationing went off, and he was going to be supplied with as much as he could possibly get.

Q. By Mr. Strong: Is that all? Did he say anything as to overdrafts? A. Yes. He said that—

Mr. Carr: That is certainly objected to on the ground it is not material. It is prejudicial to the defendant, all of this conversation.

The Court: Yes, I shall sustain that objection.

(Testimony of Thaddeus R. Loud)

Mr. Strong: As to the entire conversation or this last question?

The Court: Read the question.

(Question read by the reporter.) [294]

The Court: Read the objection.

(Record read by the reporter.)

The Court: Well, that is just limited to this question, of course.

Mr. Strong: No further questions.

Mr. Carr: That is what I understood.

Mr. Strong: I am sorry. I misunderstood again. I apologize.

The Court: All right.

Mr. Carr: Your Honor, would a recess be appropriate?

The Court: Yes.

Ladies and gentlemen, remember the admonition I have heretofore given you. Do not discuss the case among yourselves nor permit anyone to discuss it in your presence. Do not form nor express any opinion until the case is finally submitted to you under the instructions of the court.

We will now take the morning recess.

(Brief recess.)

The Court: Call the calendar, Mr. Cross.

The Clerk: Yes, your Honor. No. 19,106 Criminal, United States v. West Coast Supply Company and Paul J. Ziegler.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready.

The Court: Stipulate the jury is present?

Mr. Strong: So stipulated. [295]

(Testimony of Thaddeus R. Loud)

The Court: And the defendant is in court?

Mr. Carr: So stipulated.

Mr. Strong: So stipulated.

The Court: Proceed.

Mr. Strong: That is all.

Cross Examination

By Mr. Carr:

Q. Mr. Loud, did you have with you that day Mr. Jack Foster, Mr. Jona Taylor and some other gentleman? Who was it?

A. Myself was the only one that I recall.

Q. Three or four?

A. There were three of us and Mr. Ziegler.

Q. And that 1031 South Broadway: Is that your office? A. That was at that time, yes, sir.

Q. And you called up Mr. Ziegler and told him to come down?

A. We had requested his presence, yes.

Q. He came down at that time? A. Yes, sir.

Q. At that time did you know that Mr. Ziegler was a lawyer? A. Yes, sir, I did.

Q. You say that he said at that time he was going to get [296] sugar one way or another?

A. Yes, sir.

Q. The West Coast Supply Company's name was not mentioned at all in that conversation, was it?

A. Yes, it was.

Q. As a matter of fact, you were not even investigating the West Coast Supply Company at that time, were you? A. Not directly, no, sir.

(Testimony of Thaddeus R. Loud)

Q. Do you at the end of each day write up some minutes or notes, or something, of the day's activities so that you may look back from time to time and see what occurred? A. Yes, we do.

Q. Do you have your notes with you for that day?

A. No, sir, I do not.

Q. Are they available? A. No, sir.

Q. What has happened to them?

A. I do not know what happened to them. I think from time to time our notes are destroyed, and I have looked for them; and in moving our offices we destroyed a lot of papers we did not think of any value, and perhaps they were lost then.

Q. So you are depending entirely on your recollection of that conversation? A. Yes, sir. [297]

Q. Now, just approximately—I know you can't be specific—how many people have you interviewed since that time in connection with your investigation of OPA activities? Just a rough figure.

A. Oh, thousands.

Mr. Carr: That is all, thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Strong: I have no further witnesses, your Honor.

However, at this time I believe there were some documents which are not as yet in evidence.

At this time I offer again Government's Exhibit 6 for identification, which is the check for 600,000 pounds.

Mr. Carr: I want to reiterate all of the objections I have heretofore made and specifically add to that that this check, by the testimony of the Government's own witnesses, has shown to have been altered in that "West Coast Supply Company" was written in after the check was issued.

Mr. Strong: The testimony also shows, your Honor, that this is the check concerning which Government witness Hartt spoke to Paul Ziegler when it came into the bank, and the stipulation also shows that the signature "Paul J. Ziegler" is that of the defendant.

This is also the check which the Government witness testified was received in connection with the purchase of [298] 600,000 pounds of sugar through the broker from the Union Sugar Company. And the records in evidence show that that sugar was finally delivered, except the 220,000 pounds.

Well, I think all of that sugar was delivered, if I am not mistaken.

May I correct that? 380,000 pounds of the 600,000 pounds were delivered.

That is what the testimony and the records show.

The Court: In evidence.

The Clerk: Government's Exhibit 6 in evidence.

(The document referred to was marked Government's Exhibit No. 6 and introduced in evidence.)

[GOVERNMENT'S EXHIBIT NO. 6]

NON-TRANSFERABLE

— RATION CHECK —

THE UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATIONCHECK NO. 14-1

TRANSFER TO THE

SUGAR

RATION BANK ACCOUNT OF

Union Sugar Co.
(NAME OF BELLER)Six Hundred Thousand
(AMOUNT IN WORDS)

DATE

7/1 1946

AMOUNT IN FIGURES
600,000 -
POUNDS OF
SUGAR

TO THE

UNION BANK & TRUST CO.
OF LOS ANGELES
COMMERCIAL TRUST

West Coast Supply Company

(PRINT OR TYPE NAME OF YOUR ACCOUNT)

S.I. 1135

FR-121

LOS ANGELES, CAL.

16-77

Paul J. Ziegler
(AUTHORIZED SIGNATURE)

39	PAID THROUGH CLEARING HOUSE OR	39
PAY TO THE ORDER OF Any Bank, Banker or Trust Co. PRIOR ENDORSEMENTS GUARANTEED		
PAY TO THE ORDER OF PAYEE'S BANK OR PAYEE'S 30 JUL 11 1946 PRIOR ENDORSEMENTS GUARANTEED		
PACIFIC NATIONAL BANK 11 39 IN SAN FRANCISCO 11-39		
16-16 IN AMERICA 16-16 FEDERAL RESERVE BANK OF SAN FRANCISCO		

Union Sugar Co.

19/10/46

2/4/49

2/10/49

66

L. 1000

6-10-46 PA Co
Mr. Chief Accounting Commission

Mr. Strong: May I show that to the jury, your Honor?

The Court: Yes.

Mr. Carr: Is that in evidence as to both defendants, your Honor?

The Court: No. It is in evidence against Paul J. Ziegler and not in evidence against the West Coast Supply Company.

Mr. Strong: At this time, your Honor, I move that all the Government's Exhibits received in evidence as against Paul J. Ziegler also be received as against the defendant West Coast Supply Company.

The basis for that request is that the evidence here shows, I believe, that the defendant Paul J. Ziegler was acting on behalf of the West Coast Supply Company, without [299] regard to whether he is a partner or not.

The regulation prohibits certain acts, the Second War Powers Act, I should say; and the regulations prohibit certain acts committed by persons who are defined, as I have heretofore read to your Honor, to include "an individual, a partnership, an association, a business, trust, a corporation or any organized group of persons, whether incorporated or not."

I don't think it makes any difference in this case whether Paul J. Ziegler is or is not a partner, since he would come within the definition; and the "other persons," the West Coast Supply Company, would come within the definition of "person" meaning any other group of persons, whether incorporated or not.

If the defendant Paul J. Ziegler is acting on behalf of those persons—and the Congress saw fit to make the entity, the group entity, "a person"—in that case the act

of any one member of that entity, whether it is in the form of a partnership or in any other form is the act of that entity.

The Congress has the power to make entities for the purposes of prohibitions and other acts of any and all groups by name, whether they are organized in accordance with common law, titles of partnership or anything else.

I think that in this case the evidence is sufficient to show that Paul J. Ziegler, when he was acting, was acting only on behalf of himself; was acting on behalf of the group, which [300] is here designated by the name "West Coast Supply Company," regardless of whether it is a partnership or whether he is in it or whatever form it takes.

For those reasons I move that all evidence admitted against Paul J. Ziegler be admitted against the West Coast Supply Company.

The Court: It is true that the act of a partner within the scope of the partnership binds all the partners. But that rule does not extend to binding a partnership for an act beyond the scope of the partnership or an illegal act.

Mr. Strong: May I say something?

The Court: Yes.

Mr. Strong: I think the act in this case of issuing the checks in this entire sugar transaction was not only within the scope, as it might be construed from the association between these persons, but it is also, I believe, ratified by the West Coast Supply Company.

The method of ratification here is shown, first, by the fact that when statements are sent by the bank to show

withdrawals against that account, they are sent to the West Coast Supply Company. And the bank officer testified that at no time had there been any complaint as to the charging of these checks against that account.

I think that that act in itself constitutes a ratification of the issuance of the check against that account by Paul J. [301] Ziegler, whether he does so in his own name or whether he adds or does not add the "West Coast Supply Company" to it. Those checks were charged against the account, and I think the testimony is sufficient to indicate that they were sufficiently intended to be charged against that account when they were issued.

The testimony of at least one witness here indicated that when he called Paul J. Ziegler to return the check, Paul authorized him to insert the name of the West Coast Supply Company.

In addition to that, your Honor, the sugar was received, was shipped to the West Coast Supply Company, regardless of the particular or precise relationship which may exist between the parties, at the address, 1646, or whatever the address was. It was shipped there and received by the West Coast Supply Company. And the other partners, at least on one occasion the partner Raymond Ziegler, indicated affirmatively that the person with whom dealings were to be had was Paul J. Ziegler. That came in the testimony of one of the agents here.

The signature card with the bank indicates that the persons who could draw checks on their own signature against the account of West Coast Supply Company were, in the first instance, authorized as "Paul J. Ziegler." That is in the card here.

The card, your Honor, if a simple comparison is made [302] between the signature of Raymond Ziegler

on this document, which document your Honor admitted only as to the signature, Government's Exhibit 38—your Honor can see it; and I don't think we need any handwriting expert—that that is Raymond Ziegler in both instances; that that is the same signature and that Raymond Ziegler, who is the managing partner of the West Coast Supply Company, has apparently agreed to authorizing Paul J. Ziegler to act on his behalf in drawing these checks in each instance.

The Court: When you authorize one to draw on an account or authorize, assuming there was a partnership without indicating there was or was not, you assume that that is an authorization, for instance, on the part of the partnership to commit an illegal act.

Mr. Strong: Not in and of itself, your Honor.

The Court: No.

Mr. Strong: But when that is followed by the receipt of the sugar covered by the ration check and when that is followed by the statement of the bank showing withdrawal from that account and no complaint, no objection to the withdrawal against that account by these specific checks, I think that those facts taken together indicate an authorization, an approval of the act previously committed, if nothing further.

The Court: That, I am inclined to believe, would be a sound statement of the law with reference to a civil liability. [303]

What is the evidence here with reference to bringing home to Allen and Raymond knowledge of these overdrafts? Where is the evidence that brings home that knowledge to those individuals?

Mr. Strong: The evidence is that the bank sends a statement every three months, including those items.

The Court: That would be inference, would it not? It would not be direct testimony.

Mr. Strong: I think it is acceptable evidence, that inference.

We are not charging, your Honor, the individuals individually. We are charging the West Coast Supply Company as an entity, as the Congress permits under the Act. And the entity received the bank statement and the entity received the sugar. The sugar was shipped and delivered to West Coast Supply Company.

That is what the evidence is at this point. That entity received that sugar. That entity also received the bank statements.

I think that those two acts indicate that that knowledge was brought to them. Certainly when you receive a million pounds of sugar, it comes to your door, you take notice of the fact that you are getting a lot of sugar and if you have not authorized anybody to get it for you, you are put on notice that there is something wrong. [304]

That sugar has never been returned. That sugar was delivered to the West Coast Supply Company. It was delivered pursuant to those checks.

The Court: It is 10 minutes to 12:00.

Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you.

You will not discuss the matter among yourselves or permit anyone to discuss in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

I shall ask you to return at 2:30 because you will probably not be interested in the argument that is being presented to the court. So you will come at 2:30, please.

The court will adjourn until 2:00 o'clock for the regular session.

(Whereupon, at 11:50 o'clock a.m. an adjournment was taken until 2:00 o'clock p.m. of the same day.) [305]

Los Angeles, California, February 6, 1947, 2:00 P.M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106 Criminal, United States versus West Coast Supply Company and also Paul J. Ziegler for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: The defendants are ready.

The Court: Is it stipulated the defendant is in court?

Mr. Strong: Plaintiff so stipulates.

Mr. Carr: So stipulated.

Mr. Strong: May I continue, your Honor?

The Court: Yes.

(The following proceedings were had in the absence of the jury.)

Mr. Strong: The only other point that I would like to make is the point that, in view of the fact that a person, as defined within the statute, includes a group of organized persons, regardless of the fact of what their personal relationship may be as among themselves and in view of the fact that the obvious purpose of that definition which broadens the person from just an individual to others, to make an operating entity a person within the terms of the provision, in every instance, and in such instance, I submit to your Honor, any act of any agent of an operating entity, where it does not make any difference

whether he is a partner or an officer or [306] anything else, that act of the agent is the act of the entity as a separate person.

The entity could not possibly act except through that person.

In this particular case I think that regardless of whether the West Coast Supply Company is or is not a partnership, as I submit again, I think that is immaterial.

It, at any rate, is an organized group of persons so as to make it an entity for the purposes of the meaning of "person" in this statute, and that that organized group, insofar as its actions in handling sugar, in obtaining sugar are concerned, that organized group includes at least Paul J. Ziegler and that his act, therefore, as the act of the human who can perform any act on behalf of the separate entity, the person, the West Coast Supply Company, that the act of Paul J. Ziegler then must of necessity be the act of the entity which is the person under this definition.

Mr. Carr: May I be heard, your Honor?

The Court: No, it is not necessary.

I announced before recess some general statement which I thought was law, and during the recess I find myself fortified in those general conclusions.

" . . . Strictly speaking, there can be no ratification of a criminal act in which a specific intent is necessary. 'He (the principal) must be liable, if at all, at the [307] time the act is done' . . ."

Citing Clark & Marshall on Crimes (3d Ed.) Section 194, at page 255.

"In *Nobile v. United States*, 3 Cir., 1922, 284 F. 253, 255, the court said: 'Criminal liability of a principal or master for the act of his agent or servant does not extend

so far as his civil liability. He cannot be held criminally for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, so he might be liable civilly.' "

(Citation from *United States v. Food and Grocery Bureau of Southern California*, 43 Fed. Supp. 966 at 971.)

You will recall, gentlemen, that was practically the statement I made this morning.

In *Paschen v. United States*, Seventh Circuit, 1924, 70 Fed. (2d) 491, quoting:

"Civilly (one) is responsible for (the) acts and doings of (his) accredited agent acting within (the) scope of (his) authority,"

while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes.

And a short reference to *United States v. Wilson*, District Court, Washington, 1932, 59 Fed. (2d) at page 97; [308] I find the expression:

". . . nor can we bind a defendant who is shown to have been the agent of another defendant, either individually or groups, unless the evidence shows that what he did was done with the principal's authority and under his direction."

The court finds that there is no evidence here on the part of the Government establishing a partnership. There is no evidence before the court as to whether or not this fictitious name ever complied with the statutes of the state in adopting this name by the promoters, and there is no evidence here directly connecting the other mention-

ed parties, Raymond and Allen, with any offense, if any offense has been established, which is a matter, of course, for the jury.

The court will, therefore, exclude and will limit all of the testimony in the case and the exhibits, whatever effect they may have, to the activities of Paul J. Ziegler and will not permit this testimony to be applied in any way to the West Coast Supply Company.

Mr. Strong: May I make a request, your Honor? May I respectfully request that your Honor withhold that ruling until both cases are in?

I think your Honor has the discretion to do so and not to limit it at this time, but simply to withhold ruling on my motion to apply all the evidence to West Coast Supply [309] Company until both sides have rested?

The Court: Well, I am confronted here with the situation, Mr. Strong, of passing on these exhibits under your motion, and I have to rule on that motion when it is presented.

Mr. Strong: May I withdraw the motion?

The Court: If you withdraw the motion, then I will withdraw the ruling, of course.

Mr. Strong: Thank you, your Honor.

The Court: Have you any other testimony?

Mr. Strong: No, the Government rests.

The Court: All right.

Mr. Carr: There are one or two matters, your Honor, before the Government rests that I should like to point out.

We had a couple of witnesses—I am sure Mr. Strong would not want me to catch him by surprise—that were

relieved from the stand. One of them I don't think I even cross examined. In fact, neither of them was cross examined.

The Court: There was one witness who was supposed to be here at 2:00 o'clock to give us some information.

Mr. Carr: Now, this gentleman, Mr. Hartt, was supposed to be back.

Therefore, Mr. Strong, I suggest we clear up those matters before you close your case.

Mr. Strong: Oh, surely. I didn't know you wanted to follow that. [310]

I reopen the case to put the witness on the stand.

The Court: The Government's case will be reopened.

Mr. Carr: I think we can eliminate the testimony if we can stipulate that when he returns he will say he cannot find the card.

Mr. Strong: So stipulated. There was another man, your Honor, who was an OPA agent of the stand this morning.

Mr. Carr: That's right—Mr. Garver.

There was one other witness, too. There was Mr. Tingle who I believe was excused by Mr. Strong to go and procure some documents.

The Court: Oh, yes.

Mr. Carr: And I did not cross examine him.

The Court: For the social security card?

Mr. Carr: No. No, that is another one.

Mr. Strong: Tingle is an Alcohol Tax Unit agent who started testifying that he didn't have the card.

I move to strike Mr. Tingle's testimony.

Mr. Carr: That is satisfactory.

The Court: He was to bring in the instrument, that demand instrument.

Mr. Carr: That's right. So we are in accord with the motion to strike, and that will dispose of that.

The Court: All right.

Mr. Carr: There was one other witness you had who was [311] to bring back a social security card.

Mr. Strong: Yes. He came back, and he showed me the social security card which does not show the name of any employer. It simply says "social security card" and then it has name and a number. I thought that possibly that card would indicate an employer, but there was no indication at all.

Mr. Carr: Then we can stipulate he may be excused?

Mr. Strong: Yes.

Mr. Carr: That leaves us with Mr. Garver, your Honor. And I hate to have you call him to the stand, Mr. Strong, and then immediately start on more motions I want to make to the court.

I wonder if we could not just take up those motions now?

Mr. Strong: I will agree to that, your Honor. And then when Mr. Garver comes, Mr. Carr can call him at any time.

Mr. Carr: There is just one thing I want to prove by him, and that is the original certificates. If you will stipulate, I won't have to call him.

Mr. Strong: Stipulate those are official records of the Office of Price Administration on the dates shown?

Mr. Carr: Yes. If you have those, we can stipulate to them.

As I understand it, Mr. Strong, you will stipulate that these two documents—maybe I had better ask that they be marked as Defendant's Exhibits 1 and 2. [312]

The Clerk: A and B.

Mr. Carr: A and B. Pardon me.

The Clerk: Defendant's Exhibit A and B for identification, respectfully.

(The documents referred to were marked Defendant's Exhibits Nos. A and B for identification.)

Mr. Carr: Those, Mr. Strong, I understand are from the—

Mr. Strong: We will stipulate that they are part of the official files of the Office of Price Administration.

Mr. Carr: This is the registration certificate of the—

The Court: What is the number?

Mr. Carr: The first one, Exhibit A, your Honor, is the registration certificate on Form R-305 of the West Coast Supply Company.

Mr. Strong: 1942?

Mr. Carr: Where is the date? 1942, yes. And Exhibit B is a registration certificate for the same concern on Form R-305.

I will just leave those marked at this time for identification, if I may.

The Court: Read the last statement with reference to the last exhibit.

(Record read by the reporter.)

Mr. Carr: That clears everything up except for one [313] thing, your Honor.

I made a request yesterday respecting the matter of examining typewriters.

I called Mr. Clarke Seller's office, and unquestionably he is out engaged in a matter. And I called him today at lunch, and he will not be back until late this afternoon. So I asked them how long it would take. They said it would take at least a day to make that examination.

Under those circumstances, the way the case is going, I frankly do not feel that I am propably disposed to insist that the court delay this case on account of that matter.

So without any prejudice one way or the other, I suppose I had better not attempt to do that.

The Court: You can put it in your own case if you feel it necessary and advisable.

Mr. Carr: Yes, your Honor, certainly.

The Court: So there will be no prejudice.

Mr. Carr: But I wanted the court to know that I had made that effort.

Mr. Strong: The Government rests.

The Court: What is the date of Exhibit B for identification?

Mr. Strong: 7-2-42.

The Court: All right.

Mr. Carr: If the court please, there are various matters [314] I want to take up.

First I want to move under Rule 29 of the Rules of Criminal Procedure for the court to order an entry of judgment of acquittal on each and every count of the information as to both defendants, the West Coast Supply Company and Paul J. Ziegler.

Perhaps the order in which I take these up may save some time, your Honor.

The Court: How much time would you like, Mr. Carr?

Mr. Carr: Well, I can't say, your Honor, because if your Honor might make certain rulings, it would eliminate some argument.

If I may just proceed, I will do it as rapidly as I can without imposing on the court. I assure you I won't try to impose on you.

I think possibly, your Honor, I can anticipate an hour if I can work the thing out the way I have in mind.

The Court: Proceed.

Mr. Carr: Now, first I want to take up the information itself, your Honor, and the grounds of that motion are simply this:

First, under Rule 12(b)(2), the Rules of Criminal Procedure, provides that the court may at any time take notice of and dispose of the failure or any or every count that charges an offense. [315]

The second proposition is that the evidence is insufficient to sustain a conviction on any of the counts against either one of these defendants.

At the outset, if the court please, I must necessarily take a moment and break down Count 1 which will be applicable to all of the counts throughout, except the odd-numbered counts.

The first count is drawn under Section 15.7 (d), and it charges in substance that on July 1st these defendants willfully performed acts prohibited by that section in that defendants did willfully issue and cause to be issued a sugar ration check.

The first proposition, your Honor, is that there is no sugar ration check in evidence by the very terms of Revised Ration Order No. 3.

The Government has failed to prove that either of the defendants issued the sugar ration check.

I think this establishes it conclusively, and I am reading now, your Honor, paragraph (5) of Section 24.1 of the Ration Order. "Check" is defined—

The Court: That was read the other day, and I have it in mind, Mr. Carr. Just put in the record the section to which you refer and omit the argument because I am satisfied on that.

Mr. Carr: Well, I won't read all of it, but let me say this: the check must be drawn by a depositor. In this case [316] there is no evidence whatsoever that Paul J. Ziegler was a depositor—absolutely none.

There is some evidence, of course, that the West Coast Supply Company was a depositor, and it is probably established that West Coast was a depositor. But the evidence is lacking, wholly lacking, in proof of the issuance of a sugar rationing check by the fact that it has not been sustained, even in a civil suit, that the West Coast Supply Company had anything to do with issuing that check.

That being the case, no sugar ration check has been issued, according to that allegation.

The next part of the allegation in the information is this:

“ . . . for an amount larger than the balance in the account on which it was drawn”

I am referring now to the definition of "Account."

"Account" is paragraph (1) of Section 24.1. That simply states:

“ 'Account' means a sugar ration bank account carried by a bank”

I submit that the defendant, Paul J. Ziegler, has no account with the bank at all. The check was not drawn by the West Coast Supply Company; so it is not a check drawn on the account, on the sugar ration account.

The next point in that information is simply this: [317] that is was drawn by the West Coast Supply Company by issuing and causing to be issued to Union Sugar Company a sugar ration check which is not a check, on the evidence, not a sugar ration check drawn by the West Coast Supply Company.

I submit, your Honor, there is no proof whatsoever to sustain a criminal charge here that it was drawn by the West Coast Supply Company.

Now, Count One finishes up with the assertion:

“ . . . when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.”

The proof has shown that the account was in the West Coast's name. The check was not issued by West Coast; so the charge certainly cannot be sustained as against Ziegler in issuing a check at all, much less an overdrawing check within that section because he must be a depositor; he must have an account.

That will save referring to the latter counts. One takes of that series of counts: One, Three, Five and Seven.

Respecting the question of alteration, your Honor, I am not going into that at length. I have cited the authorities. But I submit that particularly as to Count One and Count 5—they have to do with the exhibits; Count One is Exhibit 6—and that is the count, you will recall, which refers to the check on which Leland testified he changed the [318] name himself.

That is certainly an altered check within the meaning of the Revised Ration Order.

I shall cite the section, your Honor. That is Section 15.7 Paragraph (f) which in substance says that no

check may be issued, transferred or deposited if it has been altered.

The mere fact that Leland in the first count transferred it shows that this check could not be issued. I am not claiming any violation of Leland, but under the Revised Ration Order this check could not be issued.

Respecting Count Five, that is the count, your Honor, covering the 660,000 pounds of sugar to the Hawley Sugar Company, and that is Exhibit 4, check No. 146.

That was, as you recall, testified to by Barry; and Barry finally admitted that he or someone at his place had put in the name "West Coast Supply Co."

So I submit on the question of alteration on those two counts that specifically they must fall and not be considered as evidence.

Respecting the other two counts I, of course, still contend that the suspicion was created and they should not have been admitted.

That brings me up to the proposition of the second count which has the general pattern of Counts Four, Six and Eight.

The break-down of that count is that the defendants [319] willfully performed this act prohibited by Section 2.9, General Ration Order No. 8, in that the defendants did willfully receive a rationed commodity, 280,000 pounds of sugar, from the Union Sugar Company in exchange for a ration document, to-wit, a sugar ration check.

I submit under the definitions laid down there is no ration check in evidence in this trial at the present time.

Respecting all of these counts—One, Three, Five and Seven, which are the check counts—I submit there is no offense charged now in light of the proof.

The proof cannot sustain a conviction if one is brought in by the jury because Mr. Ziegler is not a depositor. There has been no sugar ration check issued.

Respecting Ziegler, as to Counts Two, Four, Six and Eight, there is not one scintilla of evidence, your Honor, that Paul Ziegler ever received one pound of sugar. So I submit those counts I have just enumerated, the receiving counts, a motion as to them properly lies as to Paul Ziegler.

Respecting the matter of partnership—now, I don't know how much or how far your Honor wants me to go on this. I do not want to impose on the court. But I have a considerable number of points and authorities here which, in my opinion, absolutely sustain the proposition that a partnership cannot be a defendant in a criminal case.

I have Federal authorities; I have State authorities. [320]

The Court: I am not interested in that question, Mr. Carr, at this time.

Mr. Carr: Very well, your Honor.

In breaking those counts down, your Honor, I say as a matter of proof the evidence is wholly insufficient to sustain any charge against either of the defendants at this time, taking every allegation and breaking it down.

Now I come up to the proposition, really, I suppose, constitutional questions which it might well be that I should ask the court to rule on if the court would first, and then I might dispose of some of those arguments.

The Court: Upon what do you wish the court to rule, Mr. Carr?

Mr. Carr: I am not trying to get you to indicate, your Honor. Please don't misunderstand me. But I want-

ed, for example under the Reconversion Act which makes certain provisions for small businesses such as these, to bring up the constitutional question respecting West Coast Supply Company.

That may take a little time, and I don't know whether I should proceed with that now or wait until your Honor disposes of those first points.

The Court: Well, I shall dispose of the point raised today, and I shall deny the motions so far made by the defense with reference to all the counts.

Now, as to the small business question, Mr. Carr, I [321] should like to hear that.

Mr. Carr: Very well, your Honor.

This Act, your Honor, was passed, as you will recall, on October 3, 1944. It is designated the War Mobilization and Reconversion Act.

I am going to just get right down to the very basic proposition. The philosophy of the Act was to try to go from war mobilization back to reconversion and to protect mainly small business.

Mr. Strong: May I interrupt, your Honor, simply to ask the citation so that I can follow better?

Mr. Carr: The War Mobilization and Recovery Act, Volume 50.

Mr. Strong: Appendix?

Mr. Carr: The new volume 50. It is one of the last acts, page 630.

Mr. Strong: What section is the citation?

Mr. Carr: Well, it starts at 1651, Title 50 Appendix.

Mr. Strong: Thank you.

The Court: I am not sure I got that Appendix citation.

Mr. Carr: That is Title 50 Appendix, Section 1651, et seq., your Honor.

The Court: All right.

Mr. Carr: (Reading.) "There is hereby established the Office of War Mobilization and Reconversion, which [322] shall be headed by the Director of War Mobilization and Reconversion"

Skipping down to (b):

"The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:"

Then it mentions Office of Contract Settlement, Surplus War Property Administration, and so on.

Then Powers (c):

"In addition to any powers which the President is authorized to and does delegate to the Director for the purpose of more effectively coordinating the mobilization of the Nation for war, the Director shall, subject to the direction of the President—

"(1) formulate or have formulated such plans as are necessary to meet the problems arising out of the transition from war to peace;

"(2) issue such orders and regulations to executive agencies as may be necessary to provide for the exercise of their powers in a manner consistent with the plans formulated under this section or to coordinate the activities of executive agencies with respect to the problems arising out of the transition from war to peace. Each executive agency shall carry out the orders and [323] regulations of the Director expeditiously and, to the extent necessary to carry out such orders and regulations,

shall modify its operations and procedures and issue regulations with respect thereto. Nothing contained in this section shall be construed as authorizing any activities to carry out any plans formulated under this section which are not within the scope of the powers possessed by the President or the executive agencies under provisions of law other than this section”

In other words, they are taking the law that is announced and they are mobilizing this effort into the War Mobilization Office.

“(3) recommend to the Congress appropriate legislation

“(4) promote and assist in the development of demobilization and reconversion plans by executive agencies”

Meaning OPA or any other agency.

“. . . develop procedures whereby each executive agency is kept informed of proposed demobilization and reconversion plans and proposals which relate to its work

“(5) cause studies and reports to be made for him by the various executive agencies

“ * * * [324]

“(7) consult and cooperate with State and local governments

“(8) submit reports”

Now I come to the very meat of the Act, your Honor. Section 1658 provides:

“Curtailments of war production or terminations of war contracts shall be integrated and synchronized with the expansion, resumption, or initiation of production for other war purposes, and, to the greatest extent com-

patible with the effective prosecution of the war, of production for non-war use. To effectuate this policy—
 . . .”

I am skipping the Survey by contracting agencies and coming down to

“(b) Resumption of civilian production”:

“the executive agencies exercising control over manpower, production, or materials shall permit the expansion . . .”

Now, mind you, it says:

“the executive agencies exercising control over manpower, production, or materials shall permit the expansion, resumption, or initiation of production for non-war use whenever such production does not require materials, components, facilities, or labor needed for war purposes, or will not otherwise adversely effect or [325] interfere with the production for war purposes. Such production for non-war use shall be permitted regardless of whether one or more competitors normally engaged in the same type of production are still engaged in the performance under any contract which is needed for the prosecution of the war . . .”

And mind you, your Honor, it says:

“. . . and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time . . .”

To-wit, no longer can OPA, by an Act of Congress, use an historical base which base this very prosecution is predicated upon.

May I just repeat that?

“. . . and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time . . .”

Now, this is Section 1659:

“(a) Whenever the expansion, resumption, or initiation of production for non-war use is authorized, on a restricted basis, by any executive agency have a control over manpower, production, or materials, the restrictions imposed shall not be such as to prevent any small plant capable and desirous of participating in such expansion, resumption, or initiation of [326] production for non-war use from so participating in such production.”

In other words, Congress is saying that that shall not be done any longer.

“(b) Whenever such executive agency allocates available materials for the production of any item or group of items for non-war use, it shall make available a percentage of such materials for the exclusive use by small plants for the production of such item or group of items. Such percentage shall be determined by the head of such agency after giving full consideration to the claims presented by the chairman of the board of directors of the Smaller War Plants Corporation and shall be fair and equitable.”

In other words, your historical base, insofar as small business is concerned, has been wiped out by an Act of Congress.

It goes on in Paragraph (c) to define small business:

“(c) In allocating the materials thus set aside among such small plants, such executive agency shall establish criteria, standards, quotas, schedules, or other conditioning factors after consultation with the chairman of the board of directors of the Smaller War Plants Corporation. Such executive agency shall allocate such materials directly to such small plants and shall, to the fullest extent practicable, provide [327] for making such

allocations through local offices easily accessible to such small plants. For the purposes of this title (sections 1656-1660 of this Appendix), a small plant means any small business concern engaged primarily in production or manufacturing either employing two hundred and fifty wage earners or less, or coming within such other categories as may be established by the head of such executive agency in consultation with the chairman of the board of directors of the Smaller War Plants Corporation. Such other categories shall be defined by taking into consideration the comparative sizes of establishments in a particular industry as reflected by the sales volumes, quantities of materials consumed, capital investments, or by other criteria which are reasonably attributable to small plants rather than medium or large size plants."

Your Honor probably read that in Washington the other day—have you had a copy of that opinion, your Honor?

The Court: I have read it.

Mr. Carr: You have already read it.

The Court: It was held up until it was passed on by the Circuit Court.

Mr. Carr: Yes. It is now in the Circuit Court of Appeals. I understand that case is being argued tomorrow, your Honor. [328]

The Court: In view of the fact that it is in the Circuit Court of Appeals, I do not feel that is of much interest at this time.

Mr. Carr: Your Honor fully comprehends my point here?

The Court: Yes.

Mr. Carr: That that is the whole proposition of denying these small industries sugar, except on an historical

base, is in direct violation of an Act of Congress and is, therefore, invalid. And you cannot predicate the prosecution upon a rationing program. In other words, the very Revised Order here—a section is taken from this order—is now insofar as small business is concerned inconsistent with that because it still retains the historical base. In other words, it says to small industry, for example:

“You were not in business last year. You can’t get any sugar at all.”

That is entirely in violation of the Reconversion Act.

Insofar as a business in existence at the moment, a small business plant, the order still provides for the historical basis. And this very account of the West Coast Supply Company, the industrial account, by the very evidence, the fact that it is an industrial account, shows that it must be taken for granted by this court or presumed that it was based on the historical quota and is, therefore, invalid.

Now, that is that phase, your Honor, of the Reconversion [329] Act.

Respecting constitutional problems, I will say this to you very frankly: I argued one point before Judge Mathes, and that was the question of raising these various executive orders. You know, this offense occurred, if it occurred, on July 1st when the OPA act was out of existence and the President had issued his executive order which I think was filed at 10:32 on the morning these checks were written.

So there is one other constitutional point I wish to present at this time. I believe that unless your Honor wants to hear from me on those, since I have already argued, that I will not insist on re-presenting them. But there is one other point I wish to make, and that is that

in view of the present status of the case, the evidence is insufficient as to Ziegler on the checks, on the receiving, and it is insufficient as to the partnership because first a partnership cannot be indicated; it cannot be responsible. Secondly, the receipt of the sugar, insofar as Ziegler is concerned: the whole evidence shows it was received by West Coast Supply Company. There is no evidence that Paul Ziegler is a member of that partnership.

The Court: I feel that I should follow Judge Mathes' ruling, Mr. Carr, in this case in view of the fact that he has already made a ruling on the point that you mentioned.

However, what I am anxious for is that there by a [330] complete record made in this case for both sides, and that is what I am careful about.

Mr. Strong: May I just say one thing, your Honor?

The Court: Yes.

Mr. Strong: I have been following Mr. Carr's reading of the War Mobilization and Reconversion Act, which is 50 United States Code Appendix; and the part that he was reading particularly relating to the basis is contained in Section 1658, at the end of Section 1658 which says:

"Historical Note—Termination of Section, see note under Section 1651 of this Appendix."

Section 1651 of this Appendix has provisions that, to my mind, are entirely inconsistent with the provisions read by Mr. Carr. They are a new statute, enacted as of October 31, 1945; and if they are inconsistent, then they completely displace the matter which was read by Mr. Carr.

Mr. Carr: Which Section? 1656? I don't see the section you are referring to, counsel.

Mr. Strong: On page 326 of the extra part.

Mr. Carr: 326 of what?

Mr. Strong: Of the extra part.

The Court: Examine his book, Mr. Carr.

Mr. Carr: May I, your Honor?

There is an executive order there, Mr. Strong.

Mr. Strong: That's right. [331]

Mr. Carr: Well, I am familiar with that. An executive order cannot override an Act of Congress.

Mr. Strong: I wanted to put that in the report, your Honor, also to point out to your Honor that the provisions read by Mr. Carr are not self-executing; but there is a certain statutory inertia which must be overcome by the act of the Director or the President and that these executive orders which I have pointed to here are the actual guides for everyday action.

The Court: The motions of the defense will be denied and exception allowed.

Mr. Carr: Your Honor, may I just interrupt here? I think my motion specifically stated that I moved on each and every count as to each defendant.

The Court: That is right. It is so understood. Overruled; exception allowed.

Call the jury.

Mr. Strong: May we have a five-minute recess before your Honor calls the jury? Then we won't have to interrupt.

Mr. Carr: Your Honor, do I understand you are overruling as to the partnership?

The Court: Yes.

Mr. Carr: Well, may I just address the court?

The Court: Yes.

Mr. Carr: If your Honor has previously ruled that the [332] evidence is not admissible against the partnership, I respectfully insist that there is no case with which to proceed.

The Court: It has been raised again; so I thought I had the record in shape and made it very clear. The defense has raised it again; so I presumed you wanted to raise the matter again.

Mr. Carr: I do not understand that, your Honor.

The Court: Well, I have excluded the testimony and exhibits here that affected the partnership.

Mr. Carr: That is my understanding. But there is no evidence against the partnership.

The Court: Now I come to the end of the case and find the defense is not satisfied with that and make an additional motion on it.

Is that not what you have done? You have opened it up again.

Mr. Carr: No, I don't think so, your Honor. I merely asked to enter an order of—call it a dismissal, or whatever you want to call it. In other words, I think the appropriate legal step is that some action must be taken by the court now.

The Court: I reserved ruling, and the Government withdrew its motion for a ruling on that very question. Counsel withdrew it; so I did not have anything on which to rule. It was to be without prejudice to the defendant to again present [333] the matter at the conclusion of the case.

Mr. Carr: Very well, your Honor. I believe that is provided for in the new rules.

The Court: Yes, it is.

Mr. Carr: That's right, yes, your Honor.

Mr. Strong: I will withdraw my request for a recess.

The Court: All right, let us get ahead. Call the jury.

Mr. Carr: We are going to start on the defendants' case. Just five minutes, your Honor?

The Court: Well, if both sides feel they want a recess, I suppose the court does not have much discretion in the matter.

(Brief recess.)

The Court: Ex parte matters?

(Brief interruption for other court matters.)

(The following proceedings were had in the presence of the jury:)

The Court: Mr. Carr, do you desire to make an opening statement?

Mr. Carr: At this time, your Honor, I wish to rest the case on behalf of the defendant West Coast Supply Company. I do wish to make an opening statement, your Honor.

The Court: All right.

Mr. Carr: Probably before I do that, your Honor, should the jury be advised that the Government has rested and that [334] certain testimony was stricken?

The Court: Yes. I have a note here.

During the absence of the jury the court struck out the testimony of Benjamin Tingle. You will remember that was the witness who testified very briefly on the witness stand yesterday. He was from the Alcohol Tax Unit.

That testimony has been stricken out, and you are instructed to disregard it.

Is there any other matter to which you want to call the court's attention?

Mr. Carr: Except that I feel it necessary to point out that the case is only opened at this time now insofar as one of the defendants.

The Court: The defense has rested its case as to the West Coast Supply Company, and the testimony now that will be introduced and statements of defense counsel will pertain only to the defendant Paul J. Ziegler. All right.

OPENING STATEMENT ON BEHALF OF DEFENDANT PAUL J. ZIEGLER

Mr. Carr: May it please the court, ladies and gentlemen of the jury, the purpose of an opening statement, of course, is merely to acquaint you with the theory of the party's case, to let you know what we expect to prove and to acquaint you with our contention. [335]

You have probably gained the idea prior to now that our contention is that there has been no offense committed here by this defendant and that we will so prove.

Before I make that statement, I should like to point up the proposition that this case involves the willful doing of an act, the inhibited act set forth in each count of the information. In other words, there are eight counts that charge that the defendants willfully did certain acts.

We expect to offer proof to show that during last May, 1946, while Congress was debating the OPA extension, whether it should be extended, Mr. Paul Ziegler, who was then a partner of the John H. Ziegler Company and not being a partner of the West Coast Supply Company, began to make efforts to get himself in a position to procure sugar to maintain the operations of his plant.

That particular plant was relatively new but had reached a sizeable capacity and could not operate without

sugar and to maintain that business he had to obtain sugar;

That in May 1946, while Congress was debating whether or not the OPA should be extended, he was trying to keep up with it to see what would happen.

In the meantime he contacted various sugar brokers to find out if, in case the OPA were not extended, he could immediately get the sugar.

We expect to prove, as an ordinary business man, he [236] did not do it by hiding. He did this in the open.

The evidence will show that he had some conversations along in June with various brokers;

That at that time they indicated to him that there was ample sugar to be had; that the warehouses, in fact, were filled with sugar.

So along came June 29th. Mr. Ziegler, we expect to prove, had he wanted to willfully violate the law, would have gone on and obtained sugar prior to that date: July 1st.

And I want to ask you to keep in mind that date: July 1st.

That one June 29th the President vetoed the extension of the OPA. You probably all recall. There was much to-do about it.

On the following day the President went on the radio—on a Sunday, June 30th—and discussed with the people of the country—and Mr. Ziegler heard that program—about the OPA dying, the reason the President had vetoed it and that it could not be extended;

That on that Sunday, having determined in his mind that the OPA was no longer in existence, he felt that he then had a perfect right to go out and get sugar;

That on the following morning, Monday, July the 1st, after having learned of these things, after having watched the Congress worry over that bill, and OPA having terminated by [237] reason of the President's veto, Mr. Ziegler immediately got busy on Monday morning the first thing and called up these brokers and said, "I want that sugar. The OPA is dead."

We expect to show that he transacted this business with these brokers—you have already heard that—and he entered into a purchase arrangement to acquire certain sugar.

The evidence will show that at 10:32 a. m. Washington time an executive order, purporting to continue OPA in existence, was filed.

Under the Federal Register Act that is required to be filed before it brings presumptive knowledge to anyone;

That at that time in the morning, or a few minutes later, Mr. Ziegler was busy at that time, without knowing anything about the executive order, acquiring the sugar.

As a matter of fact, the proof will show that he did not get a copy of that executive order until about three weeks later, two or three weeks later—maybe not three weeks—because the evidence will show that I personally could not find one in town.

I finally came up to the United States Attorney's office, and they did not have one. We waited two or three days, and finally the United States Attorney's office was good enough to let me have a copy of that executive order;

That by the time Mr. Ziegler had received this executive order, which purported to continue the operation of the OPA, [238] the transaction was over; the sugar had been purchased; it had been delivered.

No. 11555
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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(In Two Volumes)

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(Pages 331 to 652, Inclusive)

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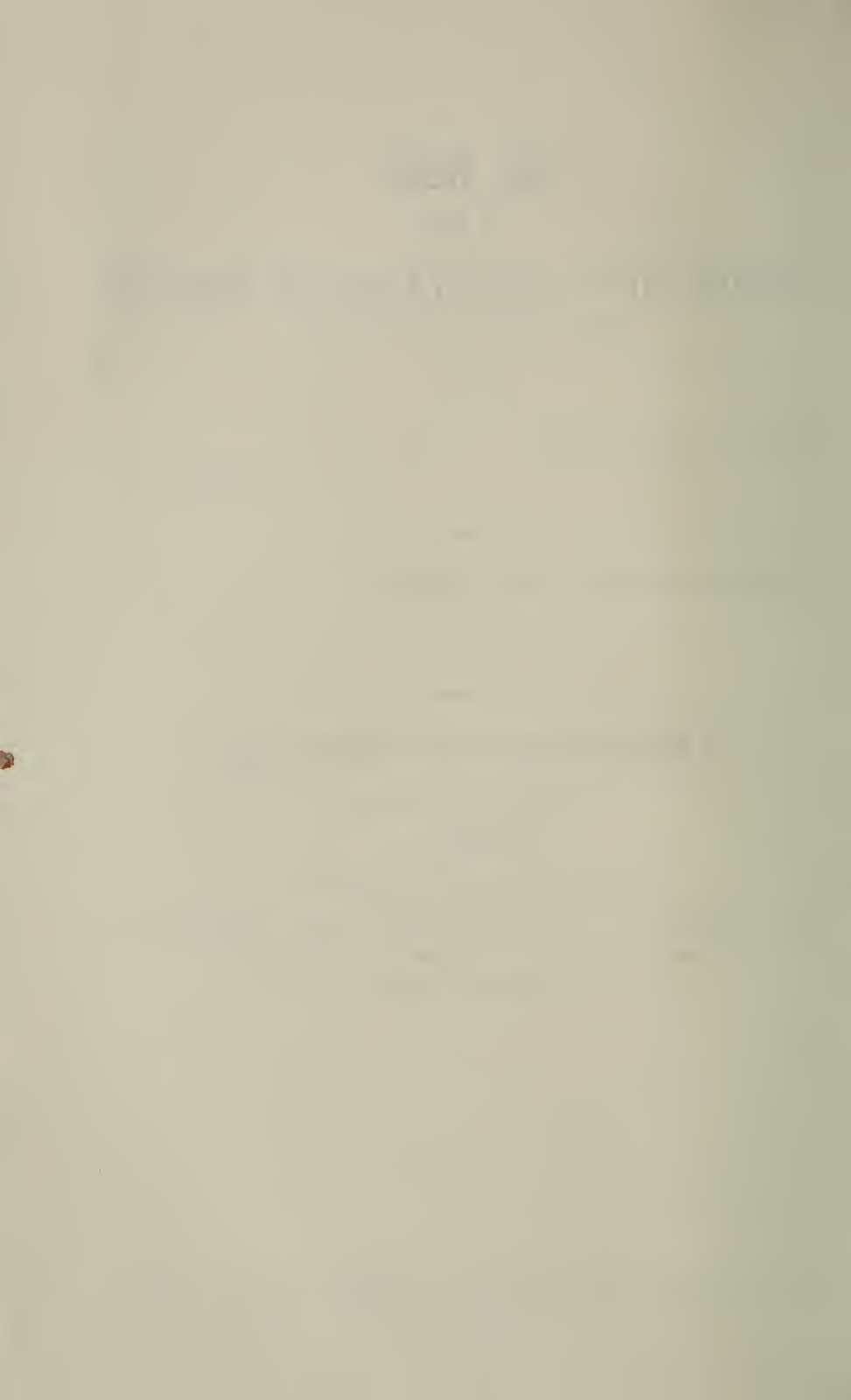
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The evidence will show—and it already has, I think—that the actual delivery to the warehouse was the delivery of the sugar, not the mere transfer of the sugar after from the warehouse to the plant;

That at the time he talked to the brokers there was some question in their mind about this telegram.

Mr. Ziegler will get on the stand and frankly admit the conversations he had with the brokers and that one of the brokers did read that telegram to him;

That after listening to the telegram, he had the broker re-read it to him.

Mr. Ziegler being a lawyer tried to analyze it and concluded in substance, How could there be a rationing program, as the telegram stated, if there was no OPA? And if the OPA was dead, how could there be a rationing program? He will explain that on the stand.

He acquired this sugar not for the purpose of black marketing, or anything of that kind, but to maintain a business enterprise. At the time he felt he was absolutely entitled to the sugar.

Insofar as giving the check was concerned, when he gave the check, he was giving nothing more than a piece of paper. Just because some broker thought there should be a ration check [239] did not convince Mr. Ziegler that he should have to give a ration check;

That he actually gave the checks, Exhibits, I believe they are, 3, 4, 5 and 6, and that at the time he gave them they were signed "Paul J. Ziegler," and one none of them—mind you, none of them—did the words "West Coast Supply Company" appear;

That thereafter, at least in one case, one of the brokers called up and said something about the check not having "West Coast Supply Company" on it, and they had a dis-

cussion again about OPA. The broker said, "Why, you don't have an account." Paul Ziegler said, "True. So what!"

And the broker said, "Well, I should put on 'West Coast Supply Company.'"

And Mr. Ziegler said, "You do as you like about it. I think I am doing what is right. You do as you like."

So the brokers in each case took it upon themselves because the ration order provides you cannot transfer a check unless it is on the account of a depositor, a ration depositor; took it upon themselves to write in "West Coast Supply Company."

We expect to prove that at that particular period of time—July 1, 1946—at least we will attempt to prove—that the emergency concerning sugar no longer existed and that there was no shortage, in fact, of sugar.

For the purpose of showing his intent, his mental condition, he had in mind those various acts, to-wit, the Congressional work on the expiration of the Act, the veto of the President and the condition of the country, or at least locally, and the nation at large, in fact, with respect to the shortage of sugar;

That he did not willfully intend to violate any law. He merely went out as a citizen to try to get sugar to maintain a reasonably small plant.

That, in general, I believe, is what we expect to prove.

If I may just have one second to consult with my client.

(Brief pause in the proceedings.)

I believe that concludes my opening statement. I perhaps will be like everyone: I will think of something after I sit down. But that is all at this time.

The Court: All right.

Mr. Carr: Mr. Ziegler.

PAUL J. ZIEGLER,

one of the defendants herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Paul J. Ziegler. [341]

Direct Examination.

By Mr. Carr:

Q. You are one of the defendants in this case, Mr. Ziegler? A. I am.

Q. What is your business or occupation?

A. I am in the manufacturing business manufacturing jams, jellies, doughnut flour, flavors, extracts, glazed fruit.

Q. Now, Mr. Ziegler, try to speak a little louder.

I might say, your Honor, this is not done for any sympathy. Mr. Ziegler is suffering with a very bad cold.

I hope, Mr. Ziegler, you will make an effort to keep your voice up.

What other supplies, generally, did you say? Bakery supplies?

A. Generally bakery supplies; all of these items are manufactured for commercial bakers.

Q. What is the name of your company?

A. John H. Ziegler Company.

Q. What is that? A corporation or a partnership?

A. It is a partnership of my father and myself.

Q. How long has it been in existence?

A. Since February 1, 1944.

Q. By the way, you are a lawyer, too, Mr. Ziegler?

A. I am.

(Testimony of Paul J. Ziegler)

Q. And you are admitted to the bar? [342]

A. I am admitted to the bar and have been practicing since 1925.

Q. You have practiced in Los Angeles?

A. Yes, sir.

Q. Do you have an office here? A. I do.

Q. Have you stopped practice?

A. Yes. I am inactive and have been for the last three years.

Q. When did you become inactive in the practice?

A. Well, progressively starting with February, 1943.

Q. What did you do at that time?

A. At that time I went down to the place of business of my father and brothers.

Q. What was the name of that business?

A. The West Coast Supply Company.

Q. Can you state who the partners of that business were at that time?

A. Then and now they are John H. Ziegler, who is my father, Allen S. Ziegler and Raymond N. Ziegler, who are my brothers.

Q. At that time the John H. Ziegler Company was not in existence, was it? A. It was not.

Q. What, if anything, generally did you do at that [343] time respecting the partnership, West Coast Supply Company? Did you work for them or represent them legally or what, if anything?

A. Well, my brother, Allen S. Ziegler, had then just gone into the Navy; and I went down there and devoted my time to the business to try to do what I could for it during his absence.

(Testimony of Paul J. Ziegler)

Q. You did not, as I understand, become a partner?

A. No, neither then or at any time.

Q. What particular phase of activity did you undertake at that time? That is '43, as I understand it?

A. Yes. Well, to begin with and for sometime thereafter I devoted myself very largely to the numerous governmental regulations which were then going into effect with respect to the operation of that and other businesses: the WPB and the OPA and the half dozen other alphabetical agencies which had issued various regulations governing the operation of any business.

Q. Did you actually participate in any managerial capacity in the business at that time? A. No.

Q. Directing your attention to about 1944, about February, was there some change in the business setup there?

A. Yes.

Q. Just in a very brief way tell us what that separation [344] or change was.

A. The partnership of West Coast Supply Company, which was a partnership of my father and two brothers, continued as before; but the manufacturing operations of the West Coast Supply Company were severed from the West Coast Supply Company and were taken over exclusively by my father to begin with. And immediately thereafter, that is, for all practical purposes, at the same time my father and I formed a partnership to carry on that manufacturing business which had formerly been conducted by the West Coast Supply Company.

Q. Incidentally, how many employees did you employ at the John H. Ziegler Company in, oh, June and July of 1946? Approximately how many employees?

A. In the neighborhood of 20.

(Testimony of Paul J. Ziegler)

Q. Do you know how many the West Coast Supply Company had as employees?

A. At that time I should say about 30.

Q. While we are on that subject, Mr. Ziegler, in July of 1946 what generally were your sugar requirements?

I am speaking now with reference to your company, the John H. Ziegler Company.

A. I would have to add them up mentally, if you like, or describe them generally with respect to the machines.

Q. Just approximately.

A. It would require about one hundred twenty five [345] 100-pound bags of sugar—that is 12,500 pounds of sugar—per day to operate the flour blending operation. It would require about 350 sacks, that is, 35,000 pounds per day to operate the jam, jelly and other kindred operations.

Q. Did the John H. Ziegler Company have a quota, sugar quota? A. No.

Q. Can you state why they did not have a quota?

A. Because under the OPA regulations with respect to sugar, no sugar was allowed for manufacturing purposes except on the basis of a percentage of use in 1941. John H. Ziegler Company had not been in business. I had not been in business in 1941.

Q. John H. Ziegler began business in 1944, is that right? A. Yes.

Q. About what month, if you recall?

A. February 1st. May I correct an answer?

The Court: Yes.

Mr. Carr: Yes, indeed.

The Witness: I said that the OPA did not provide for a sugar base for any manufacturer except one who

(Testimony of Paul J. Ziegler)

was in business in 1941. I should correct that. They did provide a sugar base for a manufacturer of jams and jellies who had been in business in 1944. [346]

Mr. Carr: I will ask that this be marked, your Honor. This is the original partnership agreement. I wonder if we might substitute a photostatic copy?

The Court: Yes.

The Clerk: Defendants' Exhibit C for identification.

(The document referred to was marked Defendants' Exhibit No. C for identification.)

Mr. Carr: I will also ask that this letter, agreement, be marked next for identification.

The Clerk: Defendants' Exhibit D for identification.

(The document referred to was marked Defendants' Exhibit No. D for identification.)

Q. By Mr. Carr: Mr. Ziegler, with reference to the conduct of the business there—West Coast Supply Company and the John H. Ziegler Company—do they have separate quarters? Or just what is the physical arrangement generally? You don't have to get into great detail.

A. Generally they are separated. The John H. Ziegler Company occupies generally frame buildings on a lot, what would probably be 1658 to 1662 Long Beach Avenue and in which the John H. Ziegler Company has its office and its factory.

The West Coast Supply Company generally occupies a brick building at 1654 Long Beach Avenue.

Q. Do you or do you not keep identical bank accounts, that is, confuse your bank accounts, your company with the [347] West Coast Supply Company?

(Testimony of Paul J. Ziegler)

A. By no means. They are separate bank accounts. The West Coast Supply Company has its own account or accounts in which I have no interest and cannot draw out of. The John H. Ziegler Company has its own bank account from which no one but myself and my father can draw.

Q. Incidentally, in making partnership income tax returns have you made returns for the John H. Ziegler Company yourself? A. Yes, of course.

Q. Do they show that as a separate concern?

Mr. Strong: Objected to. I think the returns are the best evidence.

Mr. Carr: All right, counsel, after I have let so many documents in.

Mr. Strong: I don't think that comment is necessary, your Honor. I have a right to object.

Mr. Carr: That's all right.

Q. I show you here what purports to be a partnership agreement, designated Defendants' Exhibit No. 6 for identification. Will you please—

The Court: Defendants' what?

Mr. Carr: Yes, your Honor.

The Court: No, it cannot be.

Mr. Carr: I am sorry. It looked like a "6." [348]

The Court: The numerals are for the Government and the letters for the defendant.

Q. By Mr. Carr: Are you acquainted with that document? A. Yes, I drew it.

Q. You drew the document? A. Yes.

Q. State whether or not you saw it signed?

A. I did.

(Testimony of Paul J. Ziegler)

Mr. Carr: I will offer this in evidence with the permission of the court to substitute a photostatic copy of it.

Mr. Strong: No objection.

The Court: In evidence.

The Clerk: Defendants' Exhibit C in evidence.

(The document referred to was marked Defendants' Exhibit C and introduced in evidence.)

Q. By Mr. Carr: I show you now Defendants' Exhibit D for identification which purports to be a letter agreement concerning the partnership.

Are you acquainted with that document?

A. I am.

Q. Who prepared it? A. I did.

Q. Did you see it executed? A. I did.

Mr. Carr: I will offer in evidence this document with the same request, your Honor, to substitute a photostatic copy. [349]

Mr. Strong: No objection.

The Court: What is the date of Exhibit C?

The Clerk: The partnership agreement, your Honor?

The Court: Yes.

The Clerk: It is dated the first day of January, 1939.

The Court: And the date of the letter?

The Clerk: The date of the letter, your Honor, is January 29, 1944.

The Court: All right.

The Clerk: Defendants' Exhibit D in evidence.

The Court: Exhibits C and D in evidence.

(The document referred to was marked Defendants' Exhibit No. D and introduced in evidence.)

(Testimony of Paul J. Ziegler)

Q. By Mr. Carr: Now, Mr. Ziegler, I pass you Government's Exhibits, and I will take them one at a time.

Here is Government's Exhibit No. 3, which is the check for 80,000 pounds of sugar made out to the C & H Sugar Company. Have you ever seen that before?

A. I have.

Q. Is that your signature? A. It is.

Q. When you signed that check did it have on it "West Coast Supply Company"? A. It did not.

Q. When did you first learn of its having "West Coast [350] Supply Company" on it, as far as you can remember?

A. Well, the first knowledge of its having "West Coast Supply Company" on it was when it was presented here in the court room.

Q. You had never seen it after the time you had signed it "Paul J. Ziegler"?

A. I had not seen the check after the time I signed the check, having filled it out completely, except for this "West Coast Supply Company," until it was presented here in the court room.

Q. Did you yourself deliver the check to anyone?

A. This check was transmitted by mail to Sims-Thompson Company who are the brokers for C & H Sugar Company.

Q. I show you Government's Exhibit 4, which is the check for 660,000 pounds of sugar, made out to the Holly Sugar Company.

Is that your signature? A. It is.

Q. About the "West Coast Supply Co." typed on there: did you put that on there? A. I did not.

(Testimony of Paul J. Ziegler)

Q. Did you have any conversation with someone about putting that on there? A. Yes.

Q. With whom? [351] A. With Jim Barry.

Q. Did you call Mr. Barry, or did he call you?

A. He called me.

Q. Give us the substance of that conversation, as nearly as you can recall it.

A. Jim Barry called me on the telephone toward the end of the week of July 1, 1946, and said that he had just returned or that he had returned within a day or two and that he had found this check.

He said, "The check does not carry the name of the account on it."

I said, "So what?"

He said, "Well, it should have an account name on it, shouldn't it?" I said, "Not so far as I am concerned it shouldn't."

He said, "Well, I think it ought to have some name on it, and I think it ought to have the West Coast Supply Company's name on it."

I said, "Well, that is up to you. I am certainly not going to put anything on it."

Q. Had you previously had a conversation with him relative to the purchase of this sugar? A. Yes.

Q. I will come back to that in a moment.

I show you Government's Exhibit 5, which is a check for [352] 30,000 pounds of sugar from the Spreckels Sugar Company.

Is that your signature? A. It is.

Q. How about that which appears up over the signature: "West Coast Supply Co." in ink? Did you write that in there? A. I did not.

(Testimony of Paul J. Ziegler)

Q. Did you ever have any conversation with anyone about that being put in there?

A. I had a conversation with respect to its not having been put in there at the time the check was delivered.

Q. With whom did you talk?

A. To Mel Williamson.

Q. Did he call you, or did you call him?

A. I believe he called me.

Q. You mean on the telephone, do you?

A. Yes.

Q. You had a conversation with him respecting that fact that "West Coast Supply Co." did not appear on the check?

A. Yes.

Q. Suppose you give us that conversation as near as you can recall it.

A. He called me sometime during the week of July 1st and told me that this check which I had sent to him did not carry the account name on it.

I said to him, "Well, what about it?" [353]

He said he thought it ought to have an account name on it.

I said, "I don't think so." I didn't think it ought to have anything on it.

Q. Is that the conversation?

A. That is about the whole of it.

Q. I show you Government's Exhibit No. 6, which is a check for 600,000 pounds of sugar made out to the Union Sugar Company and ask you: is that your signature?

A. It is.

Q. I notice it has "West Coast Supply Company" above it. Did you put that on there?

A. I did not.

(Testimony of Paul J. Ziegler)

Q. Do you know who did? A. No, I don't.

Q. Did you have any conversation with anyone about that going on the check? A. I did.

Q. With whom? A. Mr. Al Leland.

Q. Did he call you, or did you call him?

A. He called me.

Q. Can you give us the approximate date, Mr. Ziegler?

A. I couldn't be too sure of the date of the conversation because I had several conversations with him by telephone [354] during the two weeks after July 1st. So I think I can only say that it was sometime within the two weeks after the first of July.

Q. State the conversation between you and Mr. Leland respecting Government's Exhibit No. 6.

A. He said, "The check I got from you the other day, you didn't put the West Coast Supply Company name on it."

I said, "I know it, Al. What of it?"

He said, "Well, shouldn't it be on there?"

I said, "Not so far as I am concerned it shouldn't be on there."

He said, "Well, I don't know what the boys in San Francisco are going to think about that."

I said, "I don't care what they think about it."

He said, "Well, how about my putting it on there?"

I said, "Not on my account you don't. I can't prevent you from putting it on there, but I don't think it's necessary. You asked for a check. You got what you consider a check. What more do you want?"

Q. Now—excuse me.

A. I recall one further part of the conversation.

(Testimony of Paul J. Ziegler)

He said, "Well, if that is the way you feel about it, I will just send it up to San Francisco the way it is."

Q. Now, respecting all four of these exhibits—I am referring specifically to Government's Exhibits 3, 4, 5 and [355] 6—on which appear, except for Exhibit 5, the typewritten words "West Coast Supply"—no, I had better refer to each one.

On Exhibit 3 it is "West Coast Supply Company" typed in. On Exhibit 4 it is "West Coast Supply Co." typed in. On Exhibit 5 it is "West Coast Supply Co." in pen and ink. And on Exhibit 6 it is typed in "West Coast Supply Company."

Do I understand you to say that where the name "West Coast Supply Co." or "West Coast Supply Company" appears, either in typing or in ink, that you yourself never put those on there?

A. That is correct. And with respect to each of these checks, all of the handwriting, except the "West Coast Supply Co." is my handwriting.

Q. To which check are you referring?

A. All of them. Each of these checks is entirely in my handwriting, except the "West Coast Supply Co."

Q. Incidentally, what is the business relationship generally? Does John H. Ziegler Company have any business relation with the West Coast Supply Company?

A. Yes. We sell them merchandise.

Q. You sell them as what? A wholesaler or manufacturer or in what capacity?

A. I manufacture articles which I sell to them and which they in turn re-sell to others as a wholesaler. [356]

(Testimony of Paul J. Ziegler)

Q. West Coast Supply Company distributes other materials aside from what you manufacture, do they?

A. Oh, yes, a wide variety.

Q. Now, I want to take your mind back to the period during June of 1946, Mr. Ziegler, at the time the OPA bill was up for extension in Congress.

What, if anything, did you do toward keeping that situation in minds

A. During both May and June I followed very closely through the newspapers and over the radio what was being done or not being done in Congress as to the extension of the OPA, and during that—

Q. Excuse me.

A. During that time I consulted and conferred with sugar brokers, in particular with Jim Barry of Parrott and Company and with Leland of Schmiedell & Mailliard as to delivery of sugar as soon as and if OPA went out of existence.

Q. Did you have any conversation with any of those gentlemen respecting whether or not the OPA act would or would not be alive on July 1st or any other day?

A. I had two or three conversations with either of them prior to July 1st as to what they could do with respect to delivery of sugar if the OPA died on June 30th, which it did.

Q. Did you attempt to buy sugar from these brokers [357] during June, 1946?

A. I couldn't answer that, Mr. Carr. I couldn't tell without—

Q. Did you buy any sugar from them in June, 1946?

A. I couldn't tell you without referring to my records whether I did or not.

(Testimony of Paul J. Ziegler)

Q. Well, I will get it in this way:

Did you have any conversation with Mr. Barry, for example, respecting the possibility of buying sugar in case the OPA died? A. Yes.

Q. When? When would you place the first conversation, if you recall?

A. I should say about the middle of May.

Q. Where did that occur, if you remember?

A. I think the first one of those conversations occurred in my factory at 1662 Long Beach Avenue.

Q. Was the conversation between you and Mr. Barry?

A. Yes.

Q. Will you please give us the conversation?

A. I said, "Jim, from the newspapers and from the radio there is a possibility that they may not get together on the extension of the OPA before it expires which is presently set for the 30th of June. There is a strong possibility that there may be no OPA. If there isn't, I want to [358] be in a position to get deliveries on sugar in substantial quantities. And I want to know from you whether I can depend upon your ability to deliver should that event occur, that is, should the OPA go out of existence."

Q. Did he indicate to you whether or not he would have an available supply or did have an available supply of sugar?

A. He said that he, or rather his principal, the Holly Sugar Company, was loaded with sugar; that they had more sugar than they knew what to do with. Their warehouses were bulging with it and that he would be delighted to ship me all the sugar that I cared to buy.

(Testimony of Paul J. Ziegler)

Q. Now, did you have any later conversation with Mr. Barry about the prospect of buying sugar in case the OPA should not be extended?

A. I called him on the telephone along about the middle of June, and at that time told him over the telephone that it looked to me like there was a strong possibility that the OPA was not going to be renewed; that the way the thing was shaping up that there was a pronounced probability that the OPA would go out of existence and that I was, therefore, very intent upon being able to get shipment on sugar just as soon as that should occur.

I asked—I arranged then with him—pardon me. I will withdraw that.

I asked him how I could get in touch with him on June [359] 28th, and he told me that he probably would be out of town on June 28th but that his office could take care of it if the eventuality arose.

Q. Why June 28th?

A. Because that was the last business day before June 30th which was the day that the OPA would expire, and it was the last business day that I could give an order for sugar to be delivered on the 1st of July.

Q. Did you have any conversations generally with any other brokers along the same lines?

A. With Al Leland.

Q. With Al Leland? A. Yes.

Q. When was your first conversation with Mr. Leland?

A. I should say about the first week of May.

Q. Was that with reference to obtaining sugar in case the OPA was not extended? A. Yes.

(Testimony of Paul J. Ziegler)

Q. Who was present?

A. The first conversation, I believe, was at the factory and only Mr. Leland and myself were present.

I told Mr. Leland that it looked to me like there was a possibility that the OPA might be dead on the 30th of June; that there was so much smoke with respect to the extension of the OPA in Congress that there was a possibility that the [360] Act might not be renewed and that if that event should come to pass I wanted to get delivery on sugar in substantial quantities and I wanted to know from him whether he would have substantial quantities of sugar for immediately delivery if the OPA Act was not renewed.

Q. Well, now, generally, without giving the conversations, did you have a few or many or several conversations along that line with various brokers during the period of May and June of 1946?

A. No. The only brokers I talked to were Mr. Barry and Mr. Leland, and I had, in addition to this conversation which I have just given you in part, two other conversations with Mr. Leland on the same subject.

Q. At any rate, as I understand you, during that period you were out definitely trying to establish connections or locate places where you could purchase substantial amounts of sugar in case OPA was not extended?

A. I was making sure that I would be able to get delivery on sugar in substantial quantities and that the sugar would be available for me to get delivery on in substantial quantities.

I was assured by both of these brokers that they could and would deliver all of the sugar that I could possibly imagine.

(Testimony of Paul J. Ziegler)

Q. All right. Did you learn of the veto of the [361] President on June 29, 1946, of the OPA? A. Yes.

Q. The extension bill? A. Yes.

Q. I believe that was on a Saturday, was it not?

A. Yes, Saturday afternoon.

Q. What, if anything, did you do then respecting acquiring sugar?

A. On that day, nothing. It was Saturday afternoon and all businesses were closed, I mean businesses of this character.

Q. Did it come to your attention that the President made a speech on Sunday, June 30th, in which he explained the veto of the OPA bill?

A. Yes. I listened to the broadcast.

Q. What was the first thing you did on Monday morning, the morning after that speech, that is, in a business way?

A. Picked up the phone and started to buy sugar.

Q. Do you recall the order in which you made these purchases?

Directing your attention to Exhibits 3 through 6, inclusive—these are the four checks—do you recall the order in which you made those purchases?

A. Well, to the best of my recollection, the Union Sugar was the first that I telephoned to.

Q. What is the number of that exhibit? [362]

A. This would be Exhibit 6. The Holly Sugar, the second, is Exhibit 4.

Q. Let me get that again. The first was exhibit what? 6? A. Yes.

Q. That was to whom? Which check is that?

A. That is Union Sugar.

(Testimony of Paul J. Ziegler)

Q. Union Sugar. And Exhibit 4 was to whom?

A. Holly Sugar.

Q. Holly Sugar.

A. And frankly I don't know, don't remember, which one of these two, that is, C & H Sugar Corporation or Spreckels Sugar Company I called next.

The Court: What are those two exhibit numbers that you do not recall?

The Witness: One is Exhibit 5. That pertains to Spreckels Sugar Company. And the other is Exhibit 3. That pertains to the C & H Sugar Corporation.

The Court: All right.

Mr. Carr: Before I take that up again, I do not know that it is necessary to mark the Federal Register as an exhibit. I think it is an official document. It probably can be treated as any law book. I am going to call his attention to Executive Order 9745.

The Court: All right. [363]

Q. By Mr. Carr: I show you here a copy of the Federal Register, dated Tuesday, July 2, 1946, which contains Executive Order 9745 providing for the interim administration of certain continuing functions of the Office of Price Administration. I note the Register shows here "F. R. Doc. 46-11585; Filed, July 1, 1946; 10:32 a. m."

That would mean, you will agree, 10:32 a. m. Washington, D. C., time, eastern standard time.

Mr. Strong: I assume so, your Honor.

Q. By Mr. Carr: Mr. Ziegler, when was the first time that you read that executive order, as near as you can remember?

(Testimony of Paul J. Ziegler)

A. Sometime toward the end of July, the first of August.

Q. When did you first know or hear of such an executive order?

Mr. Strong: May I object, your Honor? I do not think it makes any difference whether he ever heard of it. The law is the law whether he heard of it or not.

The Court: I shall permit the question.

Mr. Carr: May I right here get that cleared up?

The Court: Well, I have allowed it. What is the argument about?

Mr. Carr: I don't think the jury ought to have that impression left with them at all, your Honor.

The Court: That is an argument. That is an argument, I think, for the jury. [364]

Mr. Carr: Very well, sir.

The Witness: At about the time I read it, which was toward the latter part of July or the first of August—

Q. By Mr. Carr: Did you obtain the executive order yourself? A. I did not.

Q. How did you get hold of it?

A. Well, I never did obtain it or get hold of it, Mr. Carr. I got access to the copy which you have there before you in your office.

Mr. Carr: I think probably I will have this marked as an exhibit. I may want to offer it in evidence, your Honor.

The Court: Mark it as an exhibit.

Mr. Strong: For identification, your Honor?

The Court: Yes.

Mr. Carr: Yes.

(Testimony of Paul J. Ziegler)

The Clerk: That will be Defendants' Exhibit E for identification.

(The document referred to was marked Defendants' Exhibit E for identification.)

Mr. Carr: I assume counsel will require me to prove that I personally got it from the United States Attorney?

Mr. Strong: I haven't the slightest idea where you got it.

Mr. Carr: If I make the assertion, will you accept that? [365]

Mr. Strong: Yes, anything you say.

Mr. Carr: Because if I have to testify, your Honor, it will invoke the rule of whether or not I can argue the case.

Mr. Strong: That will not be necessary, your Honor.

Q. By Mr. Carr: First let me ask you: To the best of your knowledge, when did you first hear that such an executive order as 9745 existed?

A. Toward the end of July or the first of August of 1946 after you got that copy which you have there before me. Up to that time I didn't know of any executive order of any kind.

Q. After you got the copy of Executive Order 9745, what, if anything, did you do respecting that executive order?

A. Asked you what it meant.

Q. And at that particular time was I representing you?

A. You were.

Q. You were consulting me as an attorney and lawyer?

A. Yes.

Q. At that particular time what advice did I give you?

(Testimony of Paul J. Ziegler)

Mr. Strong: I do not think that is material, your Honor. I object to the question. This is after July 1st.

Mr. Carr: Well, that is true. It may be that that question is after the event. But if that is the case, then I want counsel to stipulate with me that the dates in the information, which run up into August, are not correct [366]

Mr. Strong: I make no such stipulation. I do not even understand the request.

Mr. Carr: Well, the information charges, if you will note, your Honor, in Count Two:

"From on or about July 3, 1946, to on or about August 17, 1946. . ."

Mr. Strong: I think maybe it would save time if I just withdraw my objection, your Honor. I will withdraw it.

(Question read by the reporter.)

Q. By Mr. Carr: Respecting this particular executive order?

A. You told me that you could not understand what it meant and that it was impossible to determine what it was as a law or regulation, what effect it had.

Mr. Carr: At this time I should like to offer in evidence the Federal Register, if counsel accepts my statement that I obtained it from the United States Attorney. I should like to offer it in evidence, your Honor.

Mr. Strong: I don't think we need the document in evidence. I will stipulate that Mr. Carr got a copy of the Federal Register, which contains this executive order, on whatever date Mr. Carr says he got it.

Mr. Carr: All right. Will you stipulate it arrived in the United States Attorney's office on July 9, 1946?

(Testimony of Paul J. Ziegler)

Mr. Strong: And you say you got it after that? [368]

Mr. Carr: Yes.

Mr. Strong: I will so stipulate. As to this copy?

Mr. Carr: Yes, as to this copy.

The Court: The record will show when Mr. Carr received it.

Mr. Carr: I received it, your Honor, sometime shortly after July 9, 1946. What day I cannot say.

The Court: All right.

Q. By Mr. Carr: Can you state, Mr. Ziegler, at this time or can you pick a date and say July 10th, 12th, 15th, that all of this sugar had been paid for by that time?

A. Yes.

Q. What date? A. July 12th.

Q. 1946? A. Yes.

Q. When I am referring to sugar I mean the sugar that we are speaking now with reference to, the 600,000 pounds purchased from the Union Sugar Company, purchased from the Holly Sugar Company 660,000 pounds and from the Spreckels Sugar Company 30,000 pounds and from the C & H Sugar Corporation 80,000 pounds.

Do you mean that all of that sugar had been paid for on July 12th?

Mr. Strong: That is objected to. I think if there are any records or checks, they are the best evidence. [369]

The Court: Yes, I think so. Are they not, Mr. Carr? But why insist on that? If they were paid for, they were paid for.

Mr. Strong: I would like to see them.

Mr. Carr: I think a witness can testify when he bought an automobile. You don't have to show the sales receipt.

(Testimony of Paul J. Ziegler)

The Court: Do you not think it would be necessary to lay a foundation?

Q. By Mr. Carr: Well, who paid for the sugar?

A. I did, that is, the John H. Ziegler Company did.

Mr. Strong: I object to that, your Honor. I would like to see the check.

The Court: With that objection, of course I shall have to sustain it. You ought to be able to produce it.

Mr. Carr: Is your Honor ruling that I have to produce the check?

The Court: On that objection, yes.

Mr. Carr: I will stand on that.

Q. Now, who paid for the sugar, do you know?

A. Yes, I do.

Q. Who? A. I did.

Q. Can you tell me, Mr. Ziegler, what check would be the last check so that I may get it out of your papers over here, the last check given to pay for this sugar? [370]

A. It is the check which is dated July 12th.

Q. To whom, do you know?

A. No, I don't. But if you will hand me the papers I can give it to you in a moment.

Mr. Carr: I will ask that this be marked as exhibit next in order.

The Clerk: That will be Defendants' Exhibit F for identification.

(The document referred to was marked Defendants' Exhibit No. F for identification.)

Q. By Mr. Carr: I show you Defendants' Exhibit F for identification. Can you identify that check?

A. Yes.

Q. Is that your signature? A. It is.

(Testimony of Paul J. Ziegler)

Q. I note it has printed on it "John H. Ziegler Co."?

A. Yes.

Q. Did you sign that yourself?

A. What? The "John H. Ziegler Co."?

Q. Oh, no. Is that your name written on there?

A. Yes, that is my signature "Paul J. Ziegler."

Q. And this check was issued to the Union Sugar Company? A. Yes.

Q. In payment for what?

A. In payment for 6,000 sacks, 600,000 pounds, of sugar. [371]

Mr. Carr: I will offer this in evidence.

Mr. Strong: No objection.

The Witness: Mr. Carr, a photostatic copy—

Mr. Carr: Could we put in a photostatic copy?

The Court: Yes.

Mr. Carr: May I pass this to the jury?

The Clerk: Defendants' Exhibit F in evidence.

(The document referred to was marked Defendants' Exhibit No. F and was admitted in evidence.)

Q. By Mr. Carr: Incidentally, Mr. Ziegler, you were in court this morning when Mr. Loud testified, were you not? A. I was.

Q. I want to ask you if, during February, 1946, at 1031 South Broadway, the then office of the OPA, in the presence of Mr. Loud, Mr. Jack Foster and Mr. Jonas Taylor, you made the statement that you were going to get sugar one way or another? A. No.

Q. You were admitted to the bar at that time, were you not? A. Yes.

Mr. Carr: May I have just a moment, your Honor?

(Testimony of Paul J. Ziegler)

(Brief pause in the proceedings.)

Q. By Mr. Carr: Oh, Mr. Ziegler, the John H. Ziegler Company does not sell sugar, does it? [372]

A. No, nor do I.

Mr. Carr: I will ask that that check be marked—

Mr. Strong: It may be admitted if counsel wants it.

Mr. Carr: Very well.

The Court: Next in order, Exhibit G.

The Clerk: Defendants' Exhibit G in evidence.

(The document referred to was marked Defendants' Exhibit No. G and introduced in evidence.)

Q. By Mr. Carr: I show you, Mr. Ziegler, a check, a ration check, marked Defendants' Exhibit G in evidence, which is a check for 66,963 pounds of sugar from the—

The Court: 66,943?

Mr. Carr: 63. 66,963, your Honor, pounds of sugar, made out on the West Coast Supply Company. The bottom lines says, "Los Angeles, Calif., OPA District Office," and underneath that is some name which I cannot read.

Do you know, Mr. Strong, who it is?

Mr. Strong: No. But it is an official of the OPA.

Mr. Carr: An OPA official?

Mr. Strong: That is right.

Q. By Mr. Carr: Where did you find that check, Mr. Ziegler?

A. In an envelope addressed to the West Coast Supply Company sometime about the first week in July.

Q. About when? [373]

A. The first week in July of 1946.

Q. Was that before or after you had bought this sugar?

A. I am not sure, but I think it was after.

(Testimony of Paul J. Ziegler)

Q. I notice the check is dated June 28th, is it not?

A. Yes.

Q. Can you remember whether or not it was received or just about when it was received with reference to that date of June 28, 1946?

A. Well, it was not received before July 1st; but whether it was received on July 1st or on what date thereafter, I cannot be positive. I know that it wasn't there before July 1st.

Mr. Carr: No further questions.

Mr. Strong: Your Honor, I see that it is 4:15. I wonder if I could ask your Honor to recess at this time so that I can organize my cross examination better? It will probably save a lot more time. Also I am tired.

Mr. Carr: Well, I am tired, too, your Honor. But I would like to finish this case this week.

Mr. Strong: I will be finished with this witness before 12:00 tomorrow, your Honor.

Mr. Carr: Yes. But I have other phases of the case to put on, Mr. Strong.

The Court: I do not suppose we can get very far with the matter in 15 minutes. [374]

There has been handed to me a note advising me of the death of the Honorable Isidore Dockweiler. Mr. Dockweiler has been for many years one of the outstanding citizens of the State of California and one of the leaders of the Bar for more than half a century.

In his long and useful life he has represented the highest ideals of American citizenship, the father of a large family, each of whom has made valuable contributions to the development of this great State of California.

(Testimony of Paul J. Ziegler)

He declined many honors. He was offered a high position by President Wilson but declined it. He never turned a deaf ear to an appeal for help.

He was an officer of this court; and but a few days ago appeared before our Senior Judge, Paul J. McCormick, at which time he moved the admission of a lawyer to practice in the Federal Courts.

An outstanding citizen, a great humanitarian, loyal and devoted son of the Golden State, a truly great lawyer, an eloquent advocate has passed to the Great Beyond.

Ladies and gentlemen, this court will adjourn out of tribute to the memory of the Honorable Isidore Dockweiler. I wish to express my great regret at his passing.

The jury will be excused until 10:00 a. m. tomorrow morning.

(Whereupon, at 4:15 o'clock p. m. an adjournment was taken until 10:00 o'clock a. m., February 7, 1947.) [375]

Los Angeles, California, Friday, February 7, 1947
10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106, Criminal, United States vs. West Coast Supply Company, a partnership, and Paul J. Ziegler for further trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defendants.

The Court: Stipulate the jury is present?

Mr. Carr: So stipulated.

Mr. Strong: So stipulated.

The Court: Do you stipulate the defendant is in court?

(Testimony of Paul J. Ziegler)

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Proceed with the cross examination.

Cross Examination.

By Mr. Strong:

Q. Mr. Ziegler, I believe you said that you were never a partner of the West Coast Supply Company?

A. I did.

Q. Beg pardon? A. I did.

Q. I show you Government's Exhibit 10 for identification.

May I have these pages marked by letters, your Honor?
[377] There is more than one here.

The Court: Yes.

The Clerk: The pages of Government's Exhibit 10 for identification are marked 10-A, 10-B, 10-C, 10-D, 10-E, 10-F, 10-G, 10-H, 10-I, 10-J, 10-K and 10-L, all for identification.

(The documents referred to were marked Government's Exhibits Nos. 10-A to 10-L, inclusive for identification.)

Q. By Mr. Strong: Before I show you that, let me ask you another question.

Did you do any of the managerial work or any work for the West Coast Supply Company?

A. I did a great deal of work.

Q. I can't hear you. I am sorry.

A. I am sorry as well. I did a great deal of work for the West Coast Supply Company.

Q. You were the—beg pardon.

A. Particularly during 1943 and 1944 and 1945.

(Testimony of Paul J. Ziegler)

Q. How about 1946? A. Very little.

Q. What sort of— A. If any.

Q. —work did you do there in the preceding three years?

A. In particular I took care of practically all of the observance of Governmental regulations of the WPB and of [378] the FDA and of the OPA and of the War Manpower Commission, and so on.

Q. You were the person who was handling the OPA matters for the West Coast Supply Company during those three years? A. Yes, in large part.

Q. You were acting with the knowledge of the partners of the West Coast Supply Company?

A. That I can't answer what their knowledge was.

Q. You mean you were acting on your own?

A. I didn't say that, Mr. Strong. I said I cannot answer for their knowledge. In particular one of the partners, Allen S. Ziegler, was during all of this time absent in the Navy; and he may have known or not know, I can't tell you.

Q. But the other two partners who were not absent: they left all these matters to you, did they not?

A. If you insist on my drawing a conclusion, I would say they did.

Q. You say they did?

A. That would be my conclusion, yes.

Q. In other words, they did not have anything to do with the handling of the question of getting more sugar rations from the OPA, or anything like that? That was all done by you for them?

A. Insofar as it was done, yes.

(Testimony of Paul J. Ziegler)

Q. Yes. You did the purchasing of the sugar for West [379] Coast Supply Company, did you not? You dealt with the brokerage?

A. Well, I would rather you made your question more specific as to time, Mr. Strong, because I—

Q. 1945?

A. I don't recall that there was any sugar purchased from West Coast Supply Company in 1945.

Q. Did you say "from West Coast Supply Company"?

A. For West Coast Supply Company.

Q. How about 1946? Did you purchase sugar in 1946 for West Coast Supply Company?

A. I don't believe so, Mr. Strong.

Q. Did you purchase sugar? A. Yes.

Q. For whom did you purchase it?

A. For the John H. Ziegler Company.

Q. Is the John H. Ziegler Company what is known as an industrial user? A. Yes.

Q. Did the John H. Ziegler Company have any ration quota allocated by the OPA to purchase sugar?

A. It did not.

Q. Beg pardon? A. It did not.

Q. You, nevertheless, bought sugar directly for the John H. Ziegler Company? [380]

A. I did, and paid for it.

Q. Beg pardon? A. And paid for it.

Q. Did you not turn over any ration checks for that sugar?

Mr. Carr: I object to that question as being wholly out of the issues of the case. The John H. Ziegler Company is not charged here.

(Testimony of Paul J. Ziegler)

The Court: The only pertinency I can see is to determine whether or not these particular ration checks applied to that company.

Mr. Carr: The only trouble, your Honor, is it also exposes a question to possible other offenses and compels the defendant to testify against himself.

The Court: I will not permit that, if there were any other offenses testified to.

Mr. Carr: It may well lead to that.

Mr. Strong: Your Honor, he can claim his privilege as to self-incrimination if that is true.

The Court: Repeat the question.

(Question read by the reporter.)

Mr. Carr: That raises the question of another offense.

Mr. Strong: Your Honor, the whole theory of the defendants' case here appears to be that there are two separate companies; that somehow these checks get lost in the shuffle. [381]

I would like to know who did what so we can have the facts before the jury.

Mr. Carr: We do not object to that, but he is asking now if ration stamps or certificates were turned over on behalf of the John H. Ziegler Company. That is not in issue in this case.

The Witness: May I speak, your Honor?

The Court: I think he may be asked whether or not the checks in evidence represent purchases for John H. Ziegler Company.

Mr. Strong: Well, if your Honor please, I submit I would like to go further than that. If they say that they purchased sugar for the John H. Ziegler Company and not for the West Coast Supply Company and that con-

(Testimony of Paul J. Ziegler)

sequently there is no offense set forth in this information, I would like to know the facts.

The Court: That is admissible on another theory. The witness testified yesterday that this sugar was purchased for the John H. Ziegler Company.

Mr. Strong: Yes.

The Court: And that he paid for it. That is right.

Mr. Strong: Yes.

Mr. Carr: I am objecting to that feature. The only thing to which I am objecting he is asking if the John H. Ziegler Company gave ration stamps. That involves another offense not involved in this information at all. [382]

The Court: As I recall the law of evidence, the witness testified yesterday that when the defense went into a transaction whereby he claims that he paid for sugar which was purchased by the John H. Ziegler Company, that opens up that subject.

I do not believe that the Government then can be stopped from inquiring into that subject to determine the circumstances of that payment and whether or not—

Mr. Carr: Your Honor, I am not talking about the payment. I am talking about the delivery of ration checks or stamps. That is the only thing to which I am objecting.

In other words, that opens up the facet. If he did not give ration stamps, then it may well be there is another order violated; and that is not involved in this case at all.

He is being compelled to assert an offense against himself.

Mr. Strong: If your Honor please.

The Court: Yes?

Mr. Strong: I want to know whether he did purchase sugar for the John H. Ziegler Company. He says he did,

(Testimony of Paul J. Ziegler)

and one of the ways to purchase it is that you have to give ration cards.

The Court: I think it is admissible. I shall overrule the objection.

(Question read by the reporter.)

The Witness: The question is not quite clear, Mr. Strong. But I think the answer may be completed. [383]

Prior to July 1, 1946, I purchased sugar for the John H. Ziegler Company. I paid for the sugar so purchased for the John H. Ziegler Company, and in each and every instance prior to July 1, 1946, a ration point check for the amount of sugar purchased was given to the refinery or wholesaler from whom the sugar was purchased.

Q. By Mr. Strong: And is it not true that that ration point check was, in each and every instance, drawn on the account of the West Coast Supply Company?

Mr. Carr: That is objected to as raising a collateral offense, your Honor, prior to this information. It is raising the point of whether or not he violated some law prior to July 1st.

The Court: Overruled.

The Witness: Would you read the question, please, Mr. Reporter?

(Question read by the reporter.)

The Witness: No.

Q. By Mr. Strong: Was it drawn in any instances on the account of the West Coast Supply Company purchasing sugar for John H. Ziegler Company?

Mr. Carr: Your Honor, I object to this question because it is opening a collateral matter.

(Testimony of Paul J. Ziegler)

I can pass a check for myself to your Honor. The check could be endorsed and delivered by someone else. [384]

We are raising that whole collateral issue now, and the question is not a fair question.

Mr. Strong: I think it is a fair question.

The Court: Overruled.

The Witness: Read it, please, Mr. Reporter.

(Question read by the reporter.)

The Witness: Would you mind reframing the question, Mr. Strong? It is ambiguous the way you put it.

Mr. Strong: Yes.

Q. Here is what I want to know: I want to know whether in making the purchase of sugar for the John H. Ziegler Company during 1946 you say you gave them ration point checks. I want to know whether those ration point checks or any of those ration point checks that you gave for those purchases were drawn by you on the account of the West Coast Supply Company ration point account. A. Yes.

Q. And you were drawing checks on the account of the West Coast Supply Company whenever you drew them pursuant to authorization that you had from the West Coast Supply Company, as shown on Government's Exhibit 2, is that right?

Mr. Carr: The same objection, your Honor.

The Court: Overruled.

The Witness: Would you read it, please, Mr. Reporter?

(Question read by the reporter.) [385]

The Witness: No, I wouldn't say that.

(Testimony of Paul J. Ziegler)

Q. By Mr. Strong: Was there any other authorization which entitled you to draw on the sugar ration account of the West Coast Supply Company in addition to that exhibit, Government's Exhibit 2?

A. I wouldn't say that this is an authorization. If it is, I know of no other written authorization.

Q. Well, if you drew under any authorization, this is the only possible one if it is an authorization.

A. Well, Mr. Strong—

Q. Yes, Mr. Ziegler?

A. —in order to make my answer clear, this is the only instrument in writing that I know of which might be considered to be any written authorization.

Now, I don't want to mislead you. I hope I am not.

Q. No. Well, I do not want to mislead you either. I am simply trying to find out where there was the authority under which you drew checks for the West Coast Supply Company.

A. I say I am not answering that I drew any checks pursuant to this or anything else as an authority so to do, but that so far as I know if this is any written authorization, it is the only instrument of that character that there is or was.

Q. That is your signature on there, is it not?

A. It is. [386]

Q. That is the card filed with the bank?

A. Yes, but—

The Court: Well, the evidence shows that it is.

Mr. Carr: That was presented in the Government's case in chief.

Mr. Strong: It is to test the witness's credibility and develop other facts.

(Testimony of Paul J. Ziegler)

The Witness: Mr. Strong, if I may, I only partially answered your question, and I would like to complete it.

The Court: All right.

Mr. Strong: Yes, surely.

The Witness: This card, at the time it was filed with the bank, was not in the condition in which it now appears.

Q. By Mr. Strong: Well, what has been added?

A. If you will stand down here—

Q. Yes.

A. —I will show you. The “Manufacturing Dept.” which is typed in—

Q. Yes?

A. —has been subsequently scratched out.

Q. You mean that here where it says “Name of Account (Print),” then there are typed in the words “West Coast Supply Co.—Manufacturing Dept.”?

A. Yes.

Q. And what you are saying is that there is now a green [387] line through the words “Manufacturing Dept.” and that that green line wasn’t there at the time this card was filed with the bank?

A. That is correct.

Q. Do you by any chance know how that green line got there? A. I do not.

Q. These words down here where it says “Signature of Applicant—West Coast Supply Co. by Paul J. Ziegler”: Did you write that in there? A. I did.

Mr. Strong: Yes. May I show this to the jury, your Honor?

The Court: Yes.

The Witness: Pardon me, Mr. Strong.

(Testimony of Paul J. Ziegler)

Mr. Strong: Yes, sir.

The Witness: One more word.

Mr. Strong: Yes, sir.

The Witness: All of this was not on the card at the time that it was filed.

Q. By Mr. Strong: You are referring to a double box on the right-hand side which has printed at the top of it "Types of Ration Accounts," and what you are pointing to is some matter written in green ink on the right-hand side within that column? There are three short lines of it. That, [388] you say, was not there?

A. That is correct.

Q. That was added by somebody else?

A. Right.

Q. Is there anything else that was not there?

A. This bank rubber stamp and the date, I believe, were placed on the card at the time it was filed.

Q. In your presence?

A. Well, I don't recall, but—

Q. You do not—go ahead. I am sorry.

A. It was either placed on there at the time when the card was brought in or immediately thereafter.

Q. You do not deny that this account is with the Union Bank and Trust Company? A. Oh, no, no.

Q. Or that it was opened around March 17th?

A. That's right.

Mr. Strong: May I pass this to the jury, your Honor?

The Court: Yes.

Mr. Strong: It is dated March 17, 1943.

(Document passed to the jury.)

(Testimony of Paul J. Ziegler)

Q. By Mr. Strong: I show you a group of checks, which are Government's Exhibit 8 in evidence, and ask you whether you drew those checks as shown.

Mr. Carr: Before you answer, may I see the exhibit? [389]

That question is objected to on the ground it is prior to the information, your Honor, not involved in the issue and it raises collateral issues which may be prejudicial to this defendant.

The Court: It goes to willfulness and intent.

The Witness: With respect to each of these checks, Mr. Strong, I signed each of them.

Q. By Mr. Strong: Yes?

A. That is, each of them bears my signature. And respect to the first—

Q. That is numbered 119?

A. Yes. With respect to the first of these exhibits, which is check No. 119, all of the checks including "West Coast Supply Co.—Industrial," which appears above the written phrase "Print or Type Name of your Account" was written by me.

Q. By you? A. Yes.

Q. Thank you.

A. On the second check, which is check No. 125, in addition to my signature, or rather I should say the rubber stamp "West Coast Supply Co.—1654 Long Beach Ave.—Los Angeles 21, Calif." and the printed "Industrial" above the name of the account, was on the check at the time I signed it. [390]

Q. Now about the handwritten matter on the check?

A. That is not my handwriting.

A. All right.

(Testimony of Paul J. Ziegler)

A. But all of the handwritten matter was there at the time I signed the check.

The third in the series, which is check No. 136, in addition to my signature there is my printed script above the name of the account "West Coast Supply Co.—Wholesale," which is also in my handwriting, rather in my printed writing, which was on the check at the time I signed it.

The third check, No. 122, has a rubber stamp "West Coast Supply Co.—1654 Long Beach Ave.—Los Angeles 21, Calif." which was on the check at the time that I signed it, it has, however, a pencilled notation at the side which I am unable to identify.

The next check, which is check No. 120, has on it in my printed script "West Coast Supply Co." and alongside written in "Industrial," which is not my handwriting and which was not on the check at the time I signed it, that is, the "Industrial" was not.

Check No. 122 is the next check and contains in my printed script as well as my signature "West Coast Supply Co." above it, and at the side written in is the word "Industrial," which I don't know whose handwriting it is and I do not believe it was there at the time I signed the check. [391]

The next check, which is check No. 124, has a rubber stamp "West Coast Supply Co.—1654 Long Beach Ave.—Los Angeles 21, Calif." and alongside printed in ink the word "Industrial," all of which was on the check at the time I signed it.

Q. Those checks are all in 1946, is that right?

Mr. Carr: I think the checks show on their face.

(Testimony of Paul J. Ziegler)

The Court: Yes.

Mr. Strong: All right.

The Witness: They are all April, 1926, except the last which is May 2nd.

Q. By Mr. Strong: 1946?

A. 1946. I am sorry.

Q. At the time that you drew these checks, had any one of the partners in West Coast Supply Company, previous to that time or at any time or subsequent to that time, instructed you that you could draw checks on their account?

Mr. Carr: Objected to as raising a collateral offense, your Honor, delving into matters that are not charged in this information.

The Witness: Read it, please, Mr. Reporter.

(Question read by the reporter.)

The Witness: No.

Q. By Mr. Strong: I show you Government's Exhibit 10 for identification and ask you to look at the sheet marked [392] 10-A, which I am now showing you, the reverse side. That, I understand, is your signature?

A. It is.

Q. Did you write the word "partner" below it?

Mr. Carr: That is objected to as immaterial and prejudicial. It has no bearing on any issue in this case.

The Court: Overruled.

The Witness: Yes.

Q. By Mr. Strong: Did you write the words "West Coast Supply Co." below that? A. I did.

Q. Were you a partner of the West Coast Supply Company at that time? A. I was not.

(Testimony of Paul J. Ziegler)

Q. I show you Government's Exhibit 10-B and ask you whether that is your signature? A. It is.

Q. Did you send that letter? A. Yes.

Mr. Carr: I object to that on the same ground. The answer may stand if your Honor's ruling is the same.

The Court: Yes, overruled.

Q. By Mr. Strong: Were you acting on behalf of the West Coast Supply Company when you sent that letter?

Mr. Carr: Well, I submit that is a legal question, your [393] Honor.

Mr. Strong: It is a factual question, your Honor.

The Court: Mr. Carr, he said he did act in some capacity for the West Coast Supply Company at certain times and at other times he did not. So in view of that testimony, I assume this question is proper.

The Witness: I can't give you a categorical answer to the question, Mr. Strong; that is, I can't answer yes or no to it.

If I am permitted to explain my answer, I can answer.

Mr. Strong: Yes, please.

The Court: Yes.

The Witness: The question is whether when I sent this letter I was acting on behalf of the West Coast Supply Company. And my answer to that would be, No, that I wasn't acting on behalf of the West Coast Supply Company. I was acting on my own behalf, that is, on behalf of the John H. Ziegler Company in which I was a partner and which I ran and operated.

On behalf of that company I had procured an allotment of sugar for freezing fruit from the OPA.

(Testimony of Paul J. Ziegler)

That allotment I had procured in the name of West Coast Supply Company. I used it. I was reporting on it so that when I reported on it I reported on it on my own behalf and not for the West Coast Supply Company.

Insofar as West Coast Supply Company was concerned, West [394] Coast Supply Company was a name only in respect to this transaction.

Q. By Mr. Strong: Then why did you put on that letter "Yours very truly, West Coast Supply Co., Paul J. Ziegler"? A. Because, Mr.—

Mr. Carr: That is objected to—

The Court: Overruled.

Mr. Carr: —as subjecting the witness to collateral issues and other possible offenses.

The Court: Overruled.

The Witness: Because, Mr. Strong, when I got the allotment for the purpose of freezing the fruits, I got the allotment in the name of the West Coast Supply Company. And when I reported on the use of the allotment, I reported on it in the name of the West Coast Supply Company.

Q. By Mr. Strong: I see. Now, just going through hurriedly, would you examine all the rest of these documents, which constitute a part of Government's Exhibit 10?

I believe that you have already agreed that they bear your signature?

Mr. Carr: Now, is that a correct statement, Mr. Strong?

Mr. Strong: You stipulated, Mr. Carr, that these documents have the signature of Paul J. Ziegler.

Mr. Carr: Did I?

(Testimony of Paul J. Ziegler)

The Court: He can examine them and shorten it up if [395] there is any question, gentlemen.

Examine them, Mr. Ziegler.

The Witness: (Examining documents) Yes, those are all signed. They are all signed by me, your Honor.

Q. By Mr. Strong: You sent those letters that are a part of Government's Exhibit 10, is that right?

A. The letters which compose this exhibit, all of them were transmitted or they were mailed or brought in by hand—I can't positively recall—but as to their present condition, there is in each instance various matter appearing now on the letter which was not there at the time it was transmitted.

Q. By Mr. Strong: Well, the typewritten material was on it, is that right, and the printed letterhead was on it?

A. Yes, all of the matter which is typed in on each letter was there at the time it was transmitted.

Q. That includes the words "Very truly yours, West Coast Supply Co.," and then your name? A. Yes.

Q. And on this document, which is numbered Government's Exhibit 10-K for identification, would you say that you wrote "Paul J. Ziegler, partner, West Coast Supply Co." on that?

Mr. Carr: Same objection, same grounds, your Honor.

The Court: Overruled.

The Witness: Yes, I did. Pardon. You refer now to— [396]

Q. By Mr. Strong: Just to -K.

A. Yes, I did.

Q. As to -L, that is your signature? A. Yes.

(Testimony of Paul J. Ziegler)

Q. You had this file and filed this document, Government's Exhibit 10-L? A. Yes.

Mr. Strong: I offer in evidence Government's Exhibit 10 and all its component parts.

Mr. Carr: That is objected to on the ground that it raises collateral issues, collateral offenses; confuses the issue and works to the prejudice of this defendant.

Furthermore, there is no issue involved and you cannot prove partnership by an act or declaration of an agent.

The Court: Overruled.

The Clerk: Government's Exhibit 10 in evidence.

(The documents referred to were marked Government's Exhibit No. 10 and introduced in evidence.)

Mr. Strong: May I show that to the jury, your Honor?

The Court: Yes.

(Documents passed to the jury.)

Mr. Strong: May I have these four documents marked as one exhibit?

The Clerk: The next exhibit for the Government will be Government's Exhibit 39 for identification. [397]

(The documents referred to were marked Government's Exhibit No. 39 for identification.)

Mr. Strong: I show you Government's Exhibit 39 for identification and ask you to look at each of the four pages where it bears a signature and a title and other words.

Will you state as to the first, second and third sheets whether that is your signature, "Paul J. Ziegler," whether you wrote the word "partner" and the words "West Coast Supply Co."?

(Testimony of Paul J. Ziegler)

Mr. Carr: May I have it understood the same objection on the same grounds runs to this line of questions, your Honor?

The Court: Well, there may be some new matter developed.

Mr. Carr: If it is new, I understand it applies.

The Court: If there is something new, it may go in.

Mr. Carr: I object on the same ground.

The Court: Overruled.

Q. By Mr. Strong: All I am asking about is the signature and the word "partner" and the words "West Coast Supply Co." on Government's Exhibit 39?

A. Yes, in each instance it is my signature. The word "partners" is written by me. The words "West Coast Supply Co." are written by me.

Q. On the fourth page is that your signature and the word "partner" and the date? A. Yes. [398]

Q. You wrote that? A. Yes.

Q. Were these documents filed on or about the date shown on them by you or through you with the OPA?

Mr. Carr: Your Honor, I hate to object to each one of these questions.

The Court: It will be understood that all of the objections will run to this exhibit No. 39.

Q. By Mr. Strong: Just the typed portions. I am not interested in the pencilled notations in black or the red ink that somebody obviously wrote in in black or red.

A. Some of these documents are entirely in handwriting and no part of it is typed.

Q. Well, you had them prepared and filed, is that right, except for some things you say are added?

A. Well, Mr. Strong—

(Testimony of Paul J. Ziegler)

Q. Yes, sir?

A. —the first page here, which is dated May 26, 1944—

Q. Yes, sir?

A. —contains no part of my handwriting at all, except the signature on the reverse side.

Q. Just the signature and the word “partner” and the words “West Coast Supply Co.” Thank you.

A. I can’t tell you when it was filed or who filled it [399] out or what it means.

Q. Yes.

A. This second sheet I am certain was filed and was all typed and completed. I recognize the typing as well as my handwriting. That unquestionably was filed in the form in which it now appears, except for whatever corrections, whatever changes were made on it. Otherwise it was by the typewriter.

The Court: A little louder, Mr. Ziegler.

The Witness: I am sorry, your Honor. The third one, the first page is in my handwriting. The signature and the other language is likewise in my handwriting.

All of the material on the second page is not my handwriting. I don’t know what it is, whose handwriting it is, when it got there or what it refers to.

Q. By Mr. Strong: Except “Paul J. Ziegler, partner, West Coast Supply Co.”? A. That is correct.

Q. You wrote that?

A. All right. The fourth sheet is in my printed script, except for the matters which appear in pencil.

Q. Signed by you as partner?

A. That is right.

(Testimony of Paul J. Ziegler)

Q. And prepared on or about the dates shown on them, with the exception of the first sheet?

A. Yes, that is, the second sheet was prepared on or [400] about March 21, 1945. That is the one pertaining to meats, fats and oils.

Q. Yes. A. I am sorry.

Q. That is all right.

A. The fourth was prepared on or about September 12, 1945.

Q. As I understand, as to the second, third and fourth sheets, they were filed with the OPA?

A. Yes. Don't misunderstand me, Mr. Strong. So far as I know, the first one was filed with the OPA, too, except that I know nothing about what appears there.

Mr. Strong: To eliminate any question, if I may, your Honor, I should like to remove the first sheet from Government's Exhibit 39. And I offer the other three sheets in evidence and withdraw the first sheet.

The Court: Subject to the same objection, in evidence.

The Clerk: Government's Exhibit 39 in evidence, three sheets.

(The documents referred to were marked Government's Exhibit 39 and introduced in evidence.)

Q. By Mr. Strong: I show you Defendants' Exhibit F, which you said was a check used to pay for the sugar which we have been discussing here, purchased from the Union Sugar Company; is that right? [401]

A. Yes.

Q. And up here it says: "In payment of the following—date—items—amount—West Coast Supply Co."

(Testimony of Paul J. Ziegler)

What does that mean?

A. The rubber stamp placed on checks of the John H. Ziegler Company to identify for the payee's book-keeper the invoice which the Union Sugar Company in this instance had issued, which had been made to the West Coast Supply Company.

Q. And was for the sugar which was covered by ration check No. 144, Government's Exhibit 6, is that right?

Mr. Carr: I object to his referring to that as a "ration check," because the evidence shows it is not.

The Court: I do not think either statement is correct.

Mr. Carr: I think it is, your Honor. My statement is correct under Ration Order, revised order No. 3.

The Court: Oh, no, Mr. Carr. That is a matter for the jury.

In other words, the court is not going to determine questions of fact.

Mr. Carr: That is a question of law. My contention is that is a question of law, your Honor.

The Court: No. The Government should not have stated the question, as you have stated, Mr. Carr; and, of course, the court could not accept the statement on either side. So strike out the question. [402]

Mr. Strong: Thank you, your Honor. I shall re-frame it.

Q. This cash check for \$36,838.20, Defendants' Exhibit F, was the check in payment of the sugar covered

(Testimony of Paul J. Ziegler)

by the piece of paper, which is identified as Government's Exhibit 6 in evidence, is that right?

Mr. Carr: May I have that question. I am sorry.

The Court: Yes, repeat the question.

(Question read by the reporter.)

The Witness: So as to be perfectly clear, this money check, which is Defendants' Exhibit F, was given in payment for 6,000 bags, that is, 600,000 pounds of sugar to the Union Sugar Company.

This slip of paper, which is Government's Exhibit 6, was given to the Union Sugar Company in connection with the same 6,000 bags or 600,000 pounds of sugar for which the money check was given in payment.

Q. By Mr. Strong: Thank you, sir. I don't see here any of the other checks used in payment for the transactions involving the 30,000 pounds of sugar which was sold by the Spreckels Sugar Company in connection with which the piece of paper marked Government's Exhibit 5 was given, nor the check, money check, covering the other two transactions of 660,000 pounds and 80,000 pounds.

I ask you whether the cash checks were in the same form as this Defendants' Exhibit F? [403]

A. If it would be of any help to you, Mr. Strong, the checks are here in court.

Mr. Strong: May I see them?

Mr. Carr: Just a moment. I will decide that. I am the counsel in the case.

Mr. Strong: I am sorry. May I see them?

(Testimony of Paul J. Ziegler)

Mr. Carr: No.

Mr. Strong: I call upon the defendant for the production of the three checks.

Mr. Carr: Now, I cite that as error to call upon the defendant upon the stand to produce any evidence in this case, and I ask your Honor to instruct the jury that he is not compelled to produce any evidence, except that which he desires to produce.

The Court: In other words, on cross examination?

Mr. Carr: No, your Honor, he is not compelled to produce anything.

The Court: Oh, yes. When a witness is on the stand, Mr. Carr, the Government is entitled to cross examine him on any matters that pertain to the issue.

Mr. Carr: Does your Honor order me to produce the checks?

The Court: Yes.

Mr. Carr: I will produce them, but I want it understood it is over my objection.

The Court: That is right. Let the record so show. [404]

Mr. Carr: I might add to that, on the further ground that it might tend to incriminate or bring other and collateral offenses into this case which are not charged in the information.

The Court: That is personal privilege.

I instruct the witness at this time, in view of the statement of counsel, that if you feel, Mr. Ziegler, that

(Testimony of Paul J. Ziegler)

the production of these instruments might tend—not “do” at all—might tend to incriminate you, you have the right to refuse to answer and the court will deny the request of the Government to produce the documents.

Mr. Strong: I think it will save time if I withdraw the request, your Honor. I would rather withdraw it.

Mr. Carr: Then I am going to move at this time that the court instruct the jury to disregard the whole incident. Counsel for the Government should not have asked for them if he did not want them.

This business of making a play of asking for them and very touchingly giving up the request I don’t think is a proper approach.

Mr. Strong: May I have the checks, your Honor?

The Court: Produce the checks.

(Brief pause in the proceedings.)

Mr. Carr: Do you find them?

The Witness: Yes.

Mr. Carr: May I pick up the rest of those? [405]

The Court: Yes.

Mr. Carr: Just take the checks off.

(Brief pause in the proceedings.)

Q. By Mr. Strong: Do you now have the checks,
Mr. Ziegler? A. Yes.

Q. May I see them?

A. (Handing documents to counsel.)

Mr. Strong: May the record show that the witness is handing me the checks?

(Testimony of Paul J. Ziegler)

I should like to have them marked first before we say anything.

The Witness: All right.

Mr. Strong: May I have these checks marked for identification, each one a separate Government exhibit?

The Court: Look at the dates and try to get them in order by dates.

The Clerk: The first check will be Government's Exhibit No. 40 for identification, and that is dated July 5, 1946.

The next check is Government's Exhibit No. 41 for identification, and that is dated July 8th, 1946.

The next Government's Exhibit is No. 42 for identification, and that check is dated July 11, 1946.

The next check is Government's Exhibit No. 43, and that is dated July 11, 1946. [406]

And the next check is Government's Exhibit No. 44 for identification, and that is dated July 11, 1946.

(The documents referred to were marked Government's Exhibits Nos. 40 to 44 inclusive, and introduced in evidence.)

Mr. Carr: I have seen those, Mr. Strong.

Mr. Strong: Thank you.

Q. Now, I show you Government's Exhibits 40, 41, 42, 43 and 44. Would you now state what those are?

A. Yes.

(Testimony of Paul J. Ziegler)

Q. Let me also give you at the same time pieces of paper marked as Government's Exhibits 3, 4 and 5 in evidence.

Will you state in connection with which of these pieces of paper the money check is concerned?

Mr. Carr: Your Honor, I object to this line of questioning, so that I won't be interrupting, and I object on the grounds that I have heretofore enumerated.

The Court: Yes.

Mr. Carr: And if there is a variation, I shall at that time either waive or make my objection.

The Court: All right. It is so understood by the court and the jury.

The Witness: This Government's Exhibit No. 40, which is check No. 2698 of the John H. Ziegler Co., signed by me, to the Union Bank and Trust Company for \$24,645.04, and Government's Exhibit No. 41, which is check No. 2699 of the [407] John H. Ziegler Co., signed by me, to the Union Bank and Trust Company for \$12,-322.52; and Government's Exhibit No. 44, which is check No. 2726 from the John H. Ziegler Co., signed by me, to the Holly Sugar Corporation for \$3,696.76, these three money checks, Government's Exhibits 40, 41 and 44, were all given in payment—the first two were given to the Union Bank and Trust Company for cashier checks which were in turn given to the Holly Sugar Company. The third check was given directly to the Holly Sugar Company, all in payment for 660,000 pounds or 6,600 bags

(Testimony of Paul J. Ziegler)

of sugar which was shipped by the Holly Sugar Corporation or rather which was ordered from the Holly Sugar Corporation in connection with the same transaction.

In connection with the same transaction, this Government's Exhibit 4, this piece of paper, made to the Holly Sugar Company covering 660,000 pounds, was also given.

This money check, which is check No. 2724 of the John H. Ziegler Co., signed by myself, payable to the Spreckels Sugar Company for \$1,866.02, was given to the Spreckels Sugar Company in connection with the sale by the Spreckels Sugar Company of 300 sacks of sugar in connection with which this piece of paper, Government's Exhibit 5 covering 30,000 pounds, was also given.

This Government's Exhibit No.—it looks like “43,” but I am not sure.

The Court: Yes, Exhibit 43. Those are 42 and 43. As to [408] Government's Exhibit 43 I have noted the date “July 11, 1946.”

The Witness: This Government's Exhibit No. 43, which is a check of the John H. Ziegler Co., 2725, signed by me, to the California and Hawaiian Sugar Refining Corporation for \$5,007.42, was given to the California and Hawaiian Sugar Refining Company, that is, the C & H Sugar Company—

The Court: Now, I do not think Mr. Carr can hear anything over there.

(Testimony of Paul J. Ziegler)

The Witness: I am sorry, your Honor. My throat is so bad. I will try to do better.

This Exhibit 439, which is check No. 2725 of the John H. Ziegler Co., signed by me, to the California and Hawaiian Sugar Refining Corporation for \$5,007.42, was given to the California and Hawaiian Sugar Refining Corporation, that is, the C & H Sugar Company, in connection with the sale by it of the 80,000 pounds of sugar, in connection with which this piece of paper, which is Government's Exhibit 3, was given to the same company.

Q. By Mr. Strong: Now, I notice that on these checks which are drawn directly to the sugar companies, John H. Ziegler money checks, which are Exhibit 42, 44 and 43 for identification, there is also in the left-hand corner imprinted the words "West Coast Supply Co." in the column that says "In payment of the following"

Is that your explanation as to the presence of those words [409] on those checks, the same as it was in connection with the check which is Defendants' Exhibit F?

A. In each instance, Mr. Strong, the rubber stamp "West Coast Supply Co." is placed on the check in the corner to identify for the payee's bookkeeper the invoices which the check pays.

Q. In other words, those invoices were in the name of the West Coast Supply Company?

A. I am not positive as to that.

Q. Sir?

(Testimony of Paul J. Ziegler)

A. In the event that they were, the stamp is placed there so that the bookkeeper will not, if the invoice was made out to West Coast Supply Company, mis-identify the check and fail to give credit for it.

Q. Well, when you put the orders in with the brokers, did you not tell them who the sugar was for?

A. I did not.

Q. What did you order? Just sugar for nobody?

A. Mr. Strong—

Q. Yes?

A. —when I called on the sugar brokers I called and ordered the sugar. You asked me whether I told them who it was for. I didn't.

Q. You told them your name?

A. I didn't even have to tell them that. They were [410] sufficiently well acquainted with me to know from my voice who was talking.

Q. You just called each of the brokers and ordered a certain amount of sugar? A. Yes.

Q. And you had been buying sugar from those brokers previously? A. Yes.

Q. Had you been buying that sugar in any particular name?

A. Mr. Strong, you would have to make your question a little more specific than that in order for me to answer.

Q. I can't make it any more specific.

The Court: Now, do not argue with the witness.

Mr. Strong: I am sorry. I apologize.

(Testimony of Paul J. Ziegler)

The Court: If he does not understand it, he is entitled to have it reframed.

Strike out the question and reframe it.

Mr. Strong: May I have the question?

(Question read by the reporter.)

Mr. Carr: I submit, your Honor, that question is difficult to answer, particularly as to the name. He should ask him the fact.

The Court: Yes, ask him.

Q. By Mr. Strong: Had you been buying sugar for the [411] West Coast Supply Compay from those brokers?

A. Well, Mr. Strong, you will still have to make your questions more specific with respect to the broker and with respect to the time before I can give you an answer that will be intelligible to you or the jury.

Q. During 1946 you had been buying sugar through brokers? A. Yes.

Q. Did you at any time buy sugar in the name of the West Coast Supply Company or for the West Coast Supply Company?

A. If you confine your question to 1946, Mr. Strong—

Q. Yes, sir. A. —during 1946—

Q. Yes, sir.

A. —I had bought for the John H. Ziegler Company sugar from these brokers. I am not sure, but I think that during 1946 I had bought some sugar from each one of these companies prior to the first of July. And I

(Testimony of Paul J. Ziegler)

would believe that in each instance the invoices, or at least some of the invoices for that sugar, were made to the West Coast Supply Company.

The purchases, however, were made by me, that is, by the John H. Ziegler Company, were paid for by me, that is, the John H. Ziegler Company.

Q. But as far as the brokers were concerned, they billed that sugar to the West Coast Supply Company? [412]

Mr. Carr: That question is obvious. The record shows. It isn't up to the witness to answer that question. The record shows.

The Court: The record would be the best evidence.

Mr. Strong: Well, I am cross examining the witness and testing his credibility. I believe, if your Honor please, I should be permitted to ask him.

The Court: I am not objecting to that, but would not the records be the best evidence, counsel?

The Witness: May I ask a question, if your Honor please?

Mr. Strong: I think before I could impeach him or seek to bring in records, I should ask him the question.

The Court: Well, if he knows.

Q. By Mr. Strong: If you know?

A. May I have the question, please?

(Question read by the reporter.)

The Witness: Mr. Strong—

Mr. Strong: Yes, sir?

(Testimony of Paul J. Ziegler)

The Witness: —I don't want to argue with you, but the question is not intelligible in the form in which you put it.

Mr. Strong: I am sorry.

The Witness: The broker has nothing to do with the billing; and, of course, I can't tell you what the—

Mr. Strong: I will reframe it. I am sorry.

Q. What I want to know is this, Mr. Ziegler: You [413] called up four brokers on July 1, 1946, and bought sugar, is that right? A. That's right.

Q. You say you just called up and they knew your voice or you gave them your name and they sold you sugar? A. Right.

Q. And that sugar was thereafter sent and billed to the West Coast Supply Company, is that right?

A. I believe it was.

Q. Where did they get the name "West Coast Supply Company," if you know?

Mr. Carr: That is different.

The Witness: Uh-huh.

Q. By Mr. Strong: If you know?

A. Certainly I know.

Q. Yes?

A. They got it because from 1941 on the West Coast Supply was in business, was an established account of some of these sugar refineries for whom these brokers were acting. They thought they were requiring in their dealings with respect to sugar to have the sugar billed to an established account.

(Testimony of Paul J. Ziegler)

For two years prior to that time the sugar brokers had received in payment for the sugar which they had invoiced the checks of the John H. Ziegler Company, and they knew just as well as I did that the John H. Ziegler Company was buying the [414] sugar and that the John H. Ziegler Company would pay for the sugar.

Q. Are you finished? A. Yes.

Q. Did you give them ration checks for the sugar for the past two years?

Mr. Carr: I object to that. He says now "for the past two years."

Mr. Strong: That is the time the witness said, your Honor.

Mr. Carr: It is a collateral issue. It involves whether or not he committed offenses prior to this information. It is wholly immaterial and it is prejudicial. It was not opened on direct either.

The Court: Yes. If the witness feels that will not incriminate him but will tend to do so, he does not have to answer the question, counsel.

I shall sustain it if the witness expresses that opinion.

The Witness: Your Honor, I would take this opportunity as a matter of record, to state that I have no fear whatever of incrimination.

The Court: All right, answer the question.

The Witness: May I had it read?

(Question read by the reporter.)

The Witness: Yes, I did.

Q. By Mr. Strong: Were the checks drawn on the account of the West Coast Supply Company? [415]

(Testimony of Paul J. Ziegler)

Mr. Carr: Same objection, same grounds.

The Court: Same ruling.

The Witness: Yes. Pardon me. Not in every instance, Mr. Strong.

Q. By Mr. Strong: In some instances you did what?

Mr. Carr: Same objection.

The Court: Overruled.

Mr. Carr: Well, your Honor, did what in some instances? The question is not intelligible.

The Court: The witness is the one to state if it is not intelligible, Mr. Carr. He said in some instances. Now counsel asked in what instances.

Repeat the question.

(Question read by the reporter.)

The Witness: In some instances checks in advance, either the checks of the West Coast Supply Company or OPA checks, were deposited with the sugar refineries.

The Court: You are referring now to ration checks, not cash checks?

The Witness: That is correct, your Honor.

The Court: All right.

The Witness: I am referring to checks for ration points.

The Court: All right.

Mr. Strong: I would like to—

The Court: We will take the morning recess, ladies and [416] gentlemen of the jury. Remember the admonition I have heretofore given you not to discuss the matter among yourselves or permit anyone to discuss it

(Testimony of Paul J. Ziegler)

in your presence until the matter is finally submitted to you. You will not form nor express any opinion as to the merits of the controversy until it is finally submitted to you under the instructions of the court.

(Brief recess.)

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Proceed.

Mr. Strong: At this time, your Honor, I should like to offer in evidence Government's Exhibits 40, 41, 42, 43 and 44 which are the money checks.

Mr. Carr: I am going to object to those. I have heretofore objected on the ground that the defendant was called upon to produce them when he was not required to, and they were produced under order of the court over the objection of counsel for the defendant.

The Court: Overruled. In evidence.

The Clerk: Government's Exhibits 40 to 44, inclusive, in evidence. [417]

(The documents referred to were marked Government's Exhibits Nos. 40 to 44, inclusive, and introduced in evidence.)

[GOVERNMENT'S EXHIBIT NO. 40]

PAY TO THE ORDER OF		LOS ANGELES, CAL.		19
Union Bank & Trust Co.				\$24,645.04
TO THE		DOLLARS		
UNION BANK & TRUST CO.		John H. Ziegler Co.		
OF LOS ANGELES				
SAVINGS COMMERCIAL TRUST		By <i>Paul J. Ziegler</i>		
LOS ANGELES, CAL. 16-77				

19106 in West Coast Office

40 40

2/9/49

U.S. District Court

Over

11553



[GOVERNMENT'S EXHIBIT NO. 41]

14th Aug 1946		LOS ANGELES, CAL.		JULY 8 1946	
PAY TO THE ORDER OF		Yipes Bank + Trust Co.		\$12,322.52	
TO THE		UNION BANK & TRUST CO.		DOLLARS	
SAVINGS		OF LOS ANGELES			
COMMERCIAL		TRUST			
LOS ANGELES, CAL. 16-77		12			
MEMBER FEDERAL RESERVE BANK		John H. Ziegler Co.			
		BY Paul J. Ziegler			

191060a

West Coast Supply

41

41

U.S. District Court

11555

[GOVERNMENT'S EXHIBIT NO. 42]

4414	12-3	Misc	3804
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PAY TO THE ORDER OF *Speckels Sugar Co.* 19

\$ *1,866⁰²/₂*

DOLLARS

UNION BANK & TRUST CO.
OF LOS ANGELES
SAVINGS COMMERCIAL TRUST

Los Angeles, Cal. 16-77

John H. Ziegler Co.

Paul J. Ziegler

Case No. *19106a.* vs. *West Coast Supply Co.*

EXHIBIT No. *42* IDENTIFICATION No. *42* IN EVIDENCE

2/9/47 No. *42* OF *Dist. of Cal.*

LOS ANGELES DISTRICT COURT, Cal. Dist. of Cal.

SECURITY-FIRST NATIONAL BANK
16-3 OF LOS ANGELES 16-3

16-3 AT 16-3

FOR DEPOSIT TO THE CREDIT OF
D. & A. D. SPECKELS COMPANY
WESTERN SUGAR REFINERY
SPECKELS SUGAR COMPANY
GULF WARF, RICE & SALES CO.
KILAUE, HAWAII PLANTATION CO.
SPECKELS SUGAR CO.

11552

[GOVERNMENT'S EXHIBIT NO. 43]

2/3	9242	0150	10218
<p>BONDS</p> <p>LOS ANGELES, CAL. 19</p> <p>PAY TO THE ORDER OF <i>City of Hawaiian Islands Refining Corp.</i> \$5,007 ⁴²/₁₀₀</p> <p>UNION BANK & TRUST CO. OF LOS ANGELES SAVINGS COMMERCIAL TRUST LOS ANGELES, CAL. 16-77</p> <p>TO THE</p> <p>John H. Ziegler Co.</p> <p>By <i>Paul J. Ziegler</i></p> <p>DOLLARS</p>			

Case No. 191060.

vs.

What cost to the

EXHIBIT

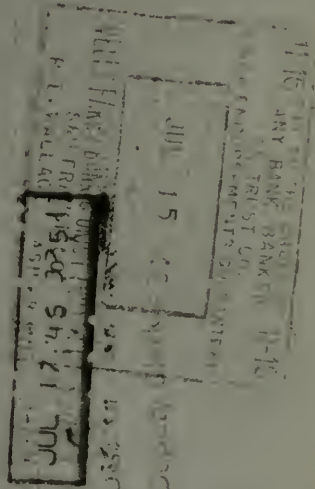
No. 42

No. 43

2/9/47

U.S. District Court, S.D. Cal.

Cross



11553

THE NEW YORK STATE

[GOVERNMENT'S EXHIBIT NO. 44]

BONDS

Los Angeles 21, Calif.

7/1	2815	disc	75 44
10 16	20		
1848	38		

LOS ANGELES, CAL. 19

PAY TO THE ORDER OF

Holly Lueger Corp.

\$ 3,696.76

DOLLARS

TO THE
UNION BANK & TRUST CO.
OF LOS ANGELES



SAVINGS
COMMERCIAL
TRUST

LOS ANGELES, CAL. 16-77

John H. Ziegler Co.

12

Paul J. Ziegler

West Coast Suits

19106 u

VS.

EXHIBIT

NO. 44

NO. 44

2/7/49

U. S. DISTRICT COURT - SOUTHERN DISTRICT OF CALIFORNIA

W. J. ...

200

11
PAY THROUGH
LOS ANGELES CLEANSING HOUSE
OR PAY TO THE CREDIT OF
ANY BANK OR BANKER
PRIOR ENDORSEMENT REQUIRED
JUL 18 1946
CITIZENS

11555

(Testimony of Paul J. Ziegler)

Mr. Carr: Could we substitute photostatic copies for those?

The Court: Yes, so ordered.

Mr. Strong: May I show those documents to the jury, your Honor?

The Court: Yes.

Mr. Strong: Plus some others?

The Court: If they are in evidence.

Mr. Strong: Yes, only if they are in evidence.

(Counsel passes documents to the jury.)

Q. By Mr. Strong: Now I will show you Defendants' Exhibit G for identification, which you said was a check, a ration check—I think it was stipulated that this was a ration check—issued by the Office of Price Administration, and I believe you said that you found that subsequent to July 1st in the mails, or some place?

A. Yes.

Q. Did you find that on the premises of the West Coast Supply Company? A. Yes.

Q. That check is drawn to the West Coast Supply Company, is that right? A. Yes. [418]

The Court: What is the exhibit, Mr. Ziegler?

The Witness: Exhibit G, your Honor.

The Court: All right.

The Witness: Defendants' Exhibit G.

Q. By Mr. Strong: That check was never deposited to the account of the West Coast Supply Company at the Union Bank or any other bank?

A. Never deposited, never cashed, never transferred.

Mr. Strong: May I have this in evidence, your Honor, as Government's next in number?

(Testimony of Paul J. Ziegler)

The Court: I think Mr. Carr introduced it.

Mr. Strong: I believe it was just for identification.

Mr. Carr: I think it was in evidence.

The Clerk: It was in evidence.

The Court: All right, in evidence.

Mr. Strong: It is in evidence. Thank you.

May I pass it to the jury?

The Court: Yes.

(Document passed to the jury.)

Mr. Carr: Is there any objection, Mr. Strong, as to checks of that kind, substituting a photostatic copy?

Mr. Strong: No objection to substituting photostats of any documents which Mr. Carr wishes to have photostated.

Q. Prior to June 30th or July 1, 1946, as I understood, you were anxious to get sugar for the John H. Ziegler Company? [419] A. Correct.

Q. And you had not gotten any sugar, is that correct, for the John H. Ziegler Company during May or June of 1946? A. I didn't so testify.

Q. I am asking you.

A. I don't believe so, Mr. Strong. If there were any sugar purchases in either May or June, 1946—

Q. Can't hear you.

A. Sorry. If there were any sugar purchases in May or June of 1946, they were not large.

Q. You knew, did you not, that you could not get sugar in May or June, 1946, without a ration check, ration currency? A. Yes.

Q. Was not that the reason that John H. Ziegler Company did not get the sugar you wanted in May or June, 1946?

(Testimony of Paul J. Ziegler)

Mr. Carr: I object to that as being argumentative, your Honor.

The Court: I think it is. Sustained.

Q. By Mr. Strong: What was the reason?

Mr. Carr: That is the same question, your Honor.

The Court: The same question. I will sustain the objection.

Q. By Mr. Strong: You said that you wanted sugar for the John H. Ziegler Company in May and June, 1946?

A. Yes. [420]

Q. You did not buy any? A. Yes.

Q. You bought some?

A. Mr. Carr—Mr. Strong, I am sorry—I answered that question just a moment ago. I don't recall definitely any sugar being purchased in May or June of 1946.

Q. What was the reason?

Mr. Carr: Well, now, I—

The Court: I think he said he does not recall having purchased any.

Mr. Strong: I submit, your Honor, that the witness testified on direct that during these months he was in need of sugar for the John H. Ziegler Company and was trying to make arrangements to get some when rationing went off.

The Court: Yes, he said that.

Mr. Strong: I am asking him why he did not buy any actually in May and June, 1946.

The Court: Well, I will let him answer. I do not think it is very material. You may answer it.

The Witness: Because in May and June, 1946, the OPA was still in existence. Points were then required.

(Testimony of Paul J. Ziegler)

On July 1st the OPA was not in existence. Points were not required.

Mr. Strong: No further questions.

Mr. Carr: Did I understand you are finished?

Mr. Strong: Yes, sir. [421]

Redirect Examination

By Mr. Carr:

Q. Mr. Ziegler, will you please explain this:

Your name appears—I think the jury has those exhibits, but I will refer to them generally.

In two or three instances your name appears where the word “partner” appears after your signature.

Can you give us the explanation for your putting the word “partner” on?

A. There were several reasons why the word “partner” appears.

Q. Well, please give them to us.

A. The principal reason is that the OPA has—had, rather,—a great number of regulations, a lot of which were enforced by clerks in the various—originally the local boards and thereafter the district office. A lot of these papers which were required to be filed had to be filled in on a line below which there was a designation of title; so that something had to be put in there.

I chose the word “partner” in order to avoid having to go back and forth to explain to the clerk or clerks that another title which I might have given myself was sufficient to warrant the filing of the particular paper in mind.

You will understand that these papers which are referred to here are only in part of a stack which would probably be as [422] high as this bench filed with respect to

(Testimony of Paul J. Ziegler)

various OPA regulations during the years between 1943 and 1946.

Q. Incidentally—pardon me.

A. Pardon me. I haven't finished my answer, Mr. Carr.

There is another reason for the use of the word "partner." It was this: that the manufacturing business, which had theretofore been conducted by the West Coast Supply Company, was taken over by me, that is, by the John H. Ziegler Company which is a partnership of my father and myself on February 1, 1944.

From that time on I was a partner insofar as the manufacturing business was concerned. And all of these papers relate to that manufacturing business.

The name of the account, insofar as the OPA was concerned, was never changed. And it was never changed because you had to have an established account with the sugar refiners in order to buy sugar at all in those days, and you also had to have a coincidence between the account which had been established with the sugar refiners and a check for ration points which you gave to them so that the name of the account with the OPA was never changed, either on February 1, 1944, or thereafter. Had it been changed, I wouldn't have been able to buy sugar with points, without points or otherwise.

Therefore, on those papers, for yet that additional reason, "partner," the term "partner" appears. [423]

Q. When you first went down to the West Coast Supply Company I believe you testified you went down more or less in the capacity of a lawyer?

A. Principally, yes.

(Testimony of Paul J. Ziegler)

Q. How much of your time, say, during the latter part of 1943 did you give to the work on OPA and other such matters? What portion of your time?

A. Well, during that period about half my time was divided between working for the OPA itself as a volunteer board member and the other half working for the West Coast Supply Company.

Mr. Carr: I would like at this time to offer in evidence Defendants' Exhibit A for identification which is a registration of retailers and wholesalers. This came from the OPA files, if your Honor please.

Mr. Strong: I will stipulate that it may go into evidence.

The Court: In evidence.

Mr. Carr: And also the same applies to Exhibit B for identification.

Mr. Strong: The same stipulation.

The Court: In evidence.

The Clerk: Defendants' Exhibits A and B in evidence.

(The documents referred to were marked Defendants' Exhibits Nos. A and B and introduced in evidence.)

The Court: Pass them to the jury. [424]

(Documents passed to the jury.)

Mr. Carr: I should like also to pass at this time to the jury the partnership agreement, which is Defendants' Exhibit C.

The Court: It may be passed.

Mr. Carr: Do you want to see it?

Mr. Strong: No. I just want to make sure it is in evidence. Yes.

Mr. Carr: And Exhibit D which is the supplemental letter of partnership agreement, and Exhibit A and B

(Testimony of Paul J. Ziegler)

which are the original registration forms of the West Coast Supply Company.

(Documents passed to the jury.)

Mr. Carr: That is all.

Mr. Strong: Just one or two more questions, your Honor.

The Court: All right.

Recross Examination

By Mr. Strong:

Q. As I understand it, you say that you could not get any ration quota for the John H. Ziegler Company from the OPA?

Mr. Carr: Well, I submit that that is a matter of law. It is right in the regulations that he could not.

Mr. Strong: I want to know whether he was able to get it.

The Witness: I will be—

Mr. Carr: Well, your Honor, he is asking for a legal [425] opinion; and the rules which provide that he could not get it are in Revised Order No. 3.

Mr. Strong: I will reframe the question.

Q. Did you at any time obtain a ration quota from the OPA for the John H. Ziegler Company?

A. I did not.

Q. Did you at any time obtain a sugar ration quota from the OPA for yourself: Paul Ziegler?

A. I did not.

Q. You wanted to get sugar for the John H. Ziegler Company, is that right? A. Correct.

The Court: Yes, he said that many times.

Mr. Strong: Yes.

(Testimony of Paul J. Ziegler)

Q. That, as I understand, was the reason that you put the word "partner" on these documents, including Government's Exhibit 39 in evidence?

Mr. Carr: I submit now that isn't quite accurate, Mr. Strong.

Mr. Strong: I am asking, your Honor. The witness can correct me, I believe.

The Court: Yes. It does not contain all of the explanation, but I will let the witness answer it.

The Witness: May I have the question, please, Mr. Reporter? [426]

(Question read by the reporter.)

The Witness: That is not the reason, Mr. Strong. The reason which I gave you and which you may be referring to so as to make it clear, the reason that in these particular exhibits the term "partner" appears, that is, one of the reasons that it appears, is that in 1944, as of February 1, 1944, when the John H. Ziegler Company was formed, when it started in business as a manufacturer, the John H. Ziegler Company was entitled to have the ration point account of the West Coast Supply Company as an industrial user transferred to the John H. Ziegler Company.

There were various reasons why that was not done, one of which was that if the account, that is, the OPA account of the West Coast Supply Company, had been transferred to me, to the John H. Ziegler Company, then the John H. Ziegler Company would have received from the OPA ration point checks for its allotments as they came up in the name of the John H. Ziegler Company. But the John H. Ziegler Company then would not be able to buy sugar because at that time and for some time be-

(Testimony of Paul J. Ziegler)

fore that the sugar companies were not selling any sugar to anybody who was not an established account of the sugar refiners for a period before that. And they also were not permitted, or thought they were not permitted, to sell sugar to any account different than the account upon which the check for the points which they got was drawn.

The result then would have been that if the account, the [427] OPA account of the West Coast Supply Company, had been transferred to the John H. Ziegler Company, that then the OPA checks and the ration point account of the West Coast Supply Company would have all been in the name of John H. Ziegler Company; and the sugar company would refuse to sell me any sugar, regardless of what points they got at all.

Consequently, the account was not changed and, therefore, at all times after February 1, 1944, all of these papers which pertained to the accounts of the West Coast Supply Company were actually the proceedings with respect to myself, that is, the John H. Ziegler Company; and accordingly when I signed the "West Coast Supply Company," one of the reasons that the name "partner" appears, outside of the reason that that is the only kind of designation that the OPA clerks recognize, is because, in my view, that is what I was; I was a partner in my own manufacturing business with my father.

Q. By Mr. Strong: But these documents you have: do they say any place "partner—John H. Ziegler Company"? A. No, they do not.

Q. You just indicated you are a partner of West Coast Supply Company? A. Correct.

Mr. Strong: That is all.

(Testimony of Paul J. Ziegler)

Mr. Carr: Just a moment. I don't think that—

Mr. Strong: May I show this to the jury? [428]

The Court: Wait a minute.

Mr. Carr: I move that the statement of Mr. Strong be stricken.

Mr. Strong: I don't think there is anything wrong with it.

Mr. Carr: You made the statement that “you just indicated you were a partner of the West Coast Supply Company.”

The Court: Well, the record speaks for itself. I will strike it out at the suggestion of Mr. Carr.

Mr. Strong: May I show these documents to the jury?

The Court: Yes.

(Documents passed to the jury.)

Mr. Strong: No further questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Carr: Mr. Schnieder.

JOHN B. SCHNIEDER,

a witness called by the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John B. Schnieder, S-c-h-n-i-e-d-e-r.

Direct Examination

By Mr. Carr: [429]

Q. Your occupation, Mr. Schnieder?

A. Economic consultant.

(Testimony of John B. Schnieder)

Q. What is your college background?

A. Graduate in economics from the University of Chicago and also doctor in economics from the University of California.

Q. What do you call yourself? Consulting economist?

A. That is right.

Q. Is that your occupation at the moment?

A. Yes, it is, Mr. Carr.

Q. How long has it been your occupation?

A. I have had a private practice for slightly over two years.

Q. Prior to that time what were you doing?

A. For over 10 years on the faculty of the University of California.

Q. During the past two years have you confined yourself to any particular subject in economics or just generally? A. Specialized in agriculture.

Q. Now, I will ask you if at my request you made certain research? A. Yes, I did.

Q. Do you need any material or data with you that you may refer to or need to refer to?

A. I have a summary table of information here. The balance is in my brief case should I need it. [430]

Q. Now, I ask you to ascertain for me and for presentation to the jury and the court for the year 1946 from official documents—and you can specify what those documents are—the available supply of sugar for consumption in the United States in 1946?

Mr. Strong: I object to that, your Honor. I don't think it makes the slightest bit of difference.

(Testimony of John B. Schnieder)

The Court: I shall hear Mr. Carr on it.

Mr. Carr: Well, my point is simply this, your Honor: that we are going to offer this testimony to show that on July 1, 1946, there was no emergency, to-wit, therefore, no authority for the rationing of sugar and that instead of there being a scarcity of sugar there was ample supply in the country and, therefore, no authority for the rationing program insofar as the Third Revised Ration Order No. 3 is concerned, and also in connection with our argument to do with reconversion.

Mr. Strong: If your Honor please, I don't think that it is proper to attack an order with reference to sugar rationing issued by introducing any evidence on a collateral matter in a criminal proceeding. It has nothing to do with this proceeding. The attack upon the rationing order is, to my mind, in a similar class as attacking the classification by a draft board in the prosecution with reference to failure to obey its orders, and it cannot be attacked.

The Court: This is a point to which I have not given any [431] consideration, and I should like to hear an argument on it.

Mr. Carr: I did not hear your Honor.

The Court: I think that is a point to which I have not given any consideration, and I should like to hear some argument on it.

Mr. Carr: Very well, sir.

The Court: Because it is new.

Ladies and gentlemen of the jury, it is now 10 minutes to 12:00. You will remember the admonition I have heretofore given. You will not discuss the matter among

yourselves or permit anyone to discuss it in your presence. You will not form nor express any opinion as to the merits of the controversy until it is finally submitted to you under the instructions of the court.

You will return here at 2:30 so that I can hear an argument on this question that is now before the court.

You may be excused until 2:30.

Gentlemen, you will return at 2:00 o'clock.

(Whereupon, at 11:50 o'clock a.m. a recess was taken until 2:00 p.m. of the same day.) [432]

Los Angeles, California, February 7, 1947, 2:00 P.M.

(The following proceedings were had in the absence of the jury:)

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106, Criminal, United States v. West Coast Supply Company and Paul J. Ziegler for further trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defense.

The Court: Mr. Carr, I should like about 15 minutes to give me the theory on the question that was before the witness and the introduction of the testimony which you proposed to offer.

Mr. Strong: May the record show the defendant is in court, your Honor?

The Court: Yes, the defendant is in court.

Mr. Carr: I shall try to do it in 15 minutes, your Honor.

The Court: I want your theory. I want to be sure it is in the record what you propose to do.

Mr. Carr: Yes. First I must refer back to the Second War Powers Act which provides simply that when-

ever the President is satisfied that the fulfillment of requirements for defense of the United States will result in a shortage in the supply of any material or any facilities for defense or for [433] private account, he may allocate such material.

Now, the theory is that that is the specific limitation by Congress giving to the President the power to allocate materials for the defense of the United States, and, of course, based on a shortage.

Our theory is this: that the power no longer exists. It is not in defense of the United States, and further we offer to show by statistical information taken from official documents, to-wit, mainly the Agricultural Department official journal showing in very succinct terms that there was no shortage actually of sugar in the United States. In fact, there was more for per capita use than was needed and that the emergency no longer existed. It was not needed in the defense of the United States. A fortiori the order is invalid.

He cannot be prosecuted at this time. The ration orders, which are based upon that power, are invalid.

I might point this out to your Honor: that Judge Mathes had a case the other day in which he denied bail. This same point was raised, and the matter was taken to the Circuit Court of Appeals, and they granted bail and said there was a substantial matter to pass upon.

This was the specific point that was raised, that is, the emergency had terminated with respect to allocation of sugar.

One other case I should like to point out to your Honor— [434] it will take a moment—is the case of *Chastleton, et al., v. Sinclair, et al.*, 1924, 68 Law. Ed. 841.

I do not have the U. S. citation at the moment. I can get it for your Honor.

This case, I think, is pretty much right to the point involved here. This was an appeal from an order dismissing a bill for injunction filed to restrain the enforcement of an order of the Rent Commission cutting down rents for apartments in the Chastleton Apartment house. The order was made August, 1922, and fixed rates from the preceding first of March. Relief was sought by the bill for injunction on several grounds, the most important of which was that the emergency that justified interference with ordinarily existing private rights in 1919 had come to an end in 1922 and no longer could be applied consistently with the 5th Amendment of the Constitution.

The original Act of October 22, 1919, was limited to expire in two years. It was amended to continue to May 22, 1922. On that day a new act declared that the emergency described in the original title still existed and reenacted the Act of 1919 to continue until May 22, 1924.

The question before the court was whether conditions had so far changed as to affect the constitutional applicability of the law. The court reversed the order of the District Court, dismissing the bill for injunction and held that a law [435] depending upon the existence of an emergency or other states of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed, and that the increased cost of living because of the war will not justify the enactment of a statute regulating rents when the emergency as to housing conditions created by influx of workers to Washington for war purposes has been relieved by the

termination of the war and by the building of additional houses.

The court said at page 843:

"We repeat what was stated in. . ."

And I skip the citations of cases.

". . . as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared . . . And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending on the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. . .

"The order, although retrospective, was passed [436] sometime after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of employees to Washington, and that other causes have lost as much of their power. It is conceivable that, as is shown in an affidavit attached to the bill, extensive activity in building has added to the ease of finding an abode. If about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiffs' allegations cannot

be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end."

And so we contend here, your Honor, that if the basis, that is, under the Second War Powers Act, of the emergency does no longer exist, this defendant is being tried on an invalid OPA order.

I want to call your Honor's attention to a more recent [437] case which I think probably is applicable, *Gibson v. United States*, that was decided just recently, and I am sure your Honor has probably read that case.

That was a Selective Service case, a more recent Selective Service case, in which the old question came out about a defendant's not being allowed to test in a criminal trial the matter of the arbitrariness of the order which required him to be inducted.

In that particular case after, you will remember, the *Falbo* case and the *Billings* case—those various cases—that first came along, the Supreme Court in which case said that he did not have to report to camp. He could make that defense in a criminal case. In other words, he could raise the question of the validity of the order of induction.

We have here a defendant who is charged with violation of an order which, if valid, I know of no other forum, your Honor, to challenge it except here.

That, in substance, is our position. So we wish to show that, in fact, there was no emergency so far as the rationing of sugar was concerned on July 1, 1946, at the time of the alleged offense.

The Court: The control is still in effect on sugar, is it not, still being rationed today?

Mr. Carr: It still was to be rationed, yes, your Honor.

The Court: But it is being actually rationed, is it not? [438]

Mr. Carr: Physically, yes.

Mr. Strong: Your Honor, the Government rests upon the language of the statute itself.

The Second War Powers Act, Title III 50 U.S.C.A. Appendix, 633, says:

“That whenever deemed by the President . . .”

Discretion, I may interpolate, obviously is vested in the President.

Whenever the President is satisfied that the fulfillment of the requirements for the defense of the United States will result in a shortage of the supply of any material or any facilities for the defense or for private account or for export, the President may allocate such material or facilities in such manner upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

As your Honor has pointed out, sugar is still being rationed. The President, in the exercise of his discretion, as permitted under the Second War Powers Act, has deemed that sugar rationing should continue.

I respectfully submit, in view of the fact that the President has made such a determination through offices duly appointed and who are permitted to exercise those powers on his behalf, that question cannot be tested here.

I think the proper forum—as Mr. Carr says he doesn’t [439] know—is the Congress of the United States. That is the place where a question should be addressed to revoke the President’s power in that respect.

As to the Gibson case, your Honor, the Government does not question the fact that arbitrariness can always be challenged in a Selective Service proceeding.

The Court: What is the citation, Mr. Carr, of the Gibson case? I do not have it in front of me.

Mr. Carr: I have the advance sheet. Let me see if I can give it to you.

The Court: If you can, give me the date of it.

Mr. Carr: It is 91 Law. Ed.

The Court: I have that.

Mr. Carr: Of volume 4 at page 282. It is the October term, your Honor.

The Court: That is very interesting and is a very new question as far as this court is concerned.

Most all of the other questions have been presented in various forms, but this one is entirely new.

Is there any decision in any of the courts that either the Government or the defendant has found with reference to a ruling on this particular question of the sugar rationing? Has it been raised in any court?

Mr. Strong: I don't know of any, your Honor.

Mr. Carr: You mean with respect to the emergency? [440]

The Court: Yes.

Mr. Carr: I don't think there is any decision on it so far as I know. Judge Mathes decided the other way, but the Circuit Court of Appeals overruled him on the bail and held it was a substantial question and granted the bail. But that, of course, is not a final determination.

The Court: Well, the Circuit Court, as you know from your experience as United States Attorney—and this may be stated in the absence of the jury—grants bail in every case.

Mr. Carr: I would say quite a number, your Honor.

The Court: I do not know where they have denied it where bail has been asked for.

This is no reflection on the court. Their duty is to perform their function the same as this court, but my experience is that in every case of which I know every request for bail has been granted. And I think they take the view that this court does: that it is a new and novel and very interesting question.

Let us go one step further. Suppose this court should hold that that was a proper defense? The defendant would then call experts on the economic conditions in the country, not only as to sugar, but I think the scope should be a little wider and include other economic problems with reference to supply and demand.

It should also include, I imagine, commitments that we have [441] outstanding that the court could not ignore with other nations during this world situation of famine which is still a part of the war program.

Is it necessary to go into all those questions? Then it would be necessary for the Government to attempt to meet that issue, if the Government could meet it, by calling a number of experts to show, if they could, a rebuttal of what the defendant contends. It would open up a very wide field of inquiry before this court.

We all know that Congress spent weeks on these questions before the Committees of the Senate and the House, investigating these matters and in determining these powers.

Would we be then invading the province of congressional legislation in determining that economic question, not only of sugar, but of course sugar is tied in with all

of the other controls, some of which have been abandoned and others of which have not?

That is a very broad question. I am very pleased to have it presented because, as I say, it is new; and the defense should present all of its defenses and complete its record so if this court is wrong, this court will be reversed.

I am going to sustain the objection of the Government, and I am going to ask Mr. Carr in the absence of the jury to make an offer of proof because I regard this question new and very important. [442]

Mr. Carr: Shall I make that offer now, your Honor?

The Court: Yes.

Mr. Carr: At this time the defendant, Paul J. Ziegler, offers to prove by the witness who was just on the stand, Dr. Schnieder—this will be very brief, your Honor.

The Court: No, make it as fully, Mr. Carr, as you feel necessary.

Mr. Carr: I think it will only take about three minutes.

The Court: All right.

Mr. Carr: (Continuing)—that the available supply of sugar for consumption in the United States in 1946 was substantially as follows, and if I may I shall just read from a sheet here and give the facts.

Mr. Strong: May I suggest, your Honor, that I have no objection to counsel's introducing that sheet as part of his offer of proof.

The Court: Well, state enough of it, Mr. Carr, in the record so that we can connect it up, then, with whatever summary you have.

Mr. Carr: Yes, your Honor. It is understood, of course, that I am offering to prove that by the witness?

The Court: Yes.

Mr. Carr: And I am now just making the offer of proof as follows:

That the requirements are based upon a 1935-39 average [443] per capita consumption of 96.5 pounds of refined sugar for a population of 139,028,300. That figure—

The Court: What is the per capita, Mr. Carr?

Mr. Carr: 139,028,300. That evidence would show that it was arrived at by a computation, taking the official statistics for 1946 but scaling it down just slightly to try to be absolutely accurate.

The requirements based on that 1935-39 average per capita of raw sugar was 7,173,860 tons. Reduced to refined sugar, it was 6,708,115 tons.

On a per capita percentage basis, the requirements of raw sugar were 103.2 pounds per person; on a refined basis, 96.5 pounds per person.

In 1946 the actual consumption of raw sugar was 5,645,913 pounds.

The refined actual consumption, that is, tons—and I am speaking with reference to short tons—was 5,276,554 tons; actual consumption per capita, raw, 81.2 pounds per person; actual consumption on a refined basis, 75.9 pounds per person.

We offer to prove that the evidence will show as to raw sugar not used of the total, which we will call a deficit, was 1,527,947 tons.

As refined sugar that would show that there was, in addition to actual consumption, or a deficit, 1,431,561 tons, or per capita there was 22 pounds of raw sugar which was not [444] used, available but not used.

Of the refined sugar there was 20.6 pounds per capita on the same basis. That is the refined.

Now, the controlled coupon sugar allocated to other countries but controlled by the United States was 1,619,000 pounds—that is raw—and 1,513,084 pounds refined. That represents 23.3 per capita, that is, on a pound basis in raw sugar; and 21.8 pounds per person on a refined sugar basis.

Now, adding those figures that I have just read to the actual consumption, which was on raw sugar, 5,645,913 tons, you get a total of 7,264,913 tons of raw sugar which were available. On the refined basis you add the above figure of actual consumption heretofore given of 5,276,554 tons, and you get a total of 6,789,638 tons which was available for consumption.

On a per capita basis you add the same percentage in the same way; your Honor; and on a raw basis you show available for consumption 104.5 pounds per person.

You show on a refined basis there was available 97.7 pounds per capita.

Now, just one further break-down and we have finished.

If you add the U. S. consumption and the U. S. controlled coupon sugar, you have a total of 7,264,913 pounds which gives you a total available to the United States of 7,577,424 tons—that last statement should have been tons of raw sugar.

The Court: Tons for both? [445]

Mr. Carr: Yes.

The Court: All right.

Mr. Carr: And if you add the refined tons on the same basis, that is, 6,789,638, you get a total tonnage of refined sugar available in 1946 of 7,081,705 tons. And if you add your percentages, you find that you have available per capita in the United States in 1946 109 pounds of sugar per person, that is, raw, or on a refined basis

you have 101.9 pounds of refined sugar available per person.

These figures were based upon data taken from the 1945 Agricultural Statistics, Bureau of Agricultural Economics of the United States Department of Agriculture, page 93; and all of the facts or all of the data would be submitted as having been obtained from the official journals or departmental, I suppose, reports by the Bureau of Foreign and Domestic Commerce and the United States Department of Commerce and the Agricultural Department.

I do not think I need designate each one of those.

So that the proof, we would hope to present, would be to the effect that while there was only 75.9 pounds per person used in the United States in 1946, there was actually available 101.9 pounds, showing that there was no actual shortage of sugar.

Mr. Strong: May I see that a moment, Mr. Carr?

Mr. Carr: I want to add about four other figures, your [446] Honor.

The Court: All right.

Mr. Carr: I think I will just take two years instead of taking several years.

I should also like to offer to prove that in 1944 the total beet and cane sugar production for use in the United States—that is 1944—was 7,635,000 tons;

That in 1946 the production for use in the United States was 7,835,000 tons; and that in 1947—no, that is after.

The Court: You could not have 1947 yet.

Mr. Carr: I meant on the basis of the first few months, but I won't offer that.

The estimated consumption, estimated United States consumption, by civilians and use by military and war services, Lend-Lease and other exports—I will just take two years—were as follows:

1944 it was 7,513,000 tons, whereas in 1946 it was only 5,565,000 tons.

One other thing, your Honor, one further break-down:

We expect to prove that in 1944 civilian use, tons of sugar, was 6,158,000 tons, and other uses, which includes mostly the military, Lend-Lease and what not—it is all military—would be 1,355,000 tons; and for 1946 the civilian use was 5,400,000 tons, but for other use 165,000 tons.

Mr. Strong: The Government objects to the entire offer [447] of proof, your Honor.

Mr. Carr: Well, that has already been sustained.

The Court: Yes. But we have the record complete and the record shows that the Government objects.

Call the jury.

Will counsel give me now about how much more time for evidence, both rebuttal and defense?

Mr. Carr: We are just about through, your Honor.

The Court: How much more time?

Mr. Carr: Very few minutes.

The Court: And rebuttal?

Mr. Strong: A very few minutes for rebuttal.

Mr. Carr: Before you bring the jury in, your Honor, if you will give me about a minute, we might save time.
(Brief pause in the proceedings.)

Mr. Carr: I think we could save time at this moment and rest the defendant Paul J. Ziegler's case, and I should like to present some motions, your Honor.

The Court: All right.

Mr. Strong: Before the rebuttal, your Honor?

Mr. Carr: Yes, certainly.

Mr. Strong: I have no objection. I am just inquiring.

The Court: The case is not in yet.

Mr. Carr: Well, I want to renew my motion.

The Court: Oh, yes, I shall give you plenty of time. [448]

Mr. Carr: Now, at this moment I am not sure about the new rules, your Honor. You know when we travel from one set of rules to a new set of rules, a lawyer can very easily make a mistake.

The Court: Yes.

Mr. Carr: The old practice was that you had to renew your motion at the end of the defendant's case.

Now, just in an abundance of precaution, I want to renew the motions which I have heretofore made and move the court to enter an order or judgment of acquittal as to both of these defendants on each and every count of the information.

Now, I won't at this moment, if you do not want me to, recap some of the problems. But I certainly do want to insist, that in view of the position of the case, that the West Coast Supply Company certainly ought to go out at this time because there is no evidence to support conviction if the jury brought in a conviction in the case of the West Coast Supply Company. And the rebuttal can rebut nothing, but at this moment I think that at least we ought to dispose of that and I should like the privilege of renewing the objection, I mean the motion, even if there was rebuttal.

The Court: Oh, I shall certainly grant that. It is the opinion of the court that the motion should be made at the conclusion of all of the testimony, but out of an abundance of caution it is well, as Mr. Carr has done, to make the motion [449] at this time.

For that reason they will be denied without prejudice, and the defendant may renew them at the end of the testimony.

It will be understood that all of the objections which the defendants have made at the close of the Government's case are now in the record at this time.

Mr. Carr: Yes.

The Court: Overruled, exception allowed.

Call the jury.

(The jury returns to the court room at 2:33 o'clock p. m.)

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: And the defendant is in court?

Mr. Strong: So stipulated.

The Court: Mr. Carr?

Mr. Carr: Yes, I do. I am sorry. I thought I said it, your Honor.

The Court: All right.

Mr. Strong: Does the defendant rest?

Mr. Carr: I believe we stated we did, yes.

The Court: All right. Let the record show the defendant rests.

Mr. Strong: Mr. Leland. [450]

REBUTTAL

ALBERT F. LELAND (Recalled)

a witness for the plaintiff, having been previously sworn, was recalled and testified further in rebuttal as follows:

The Court: State your name, please.

The Witness: Albert F. Leland.

The Court: You have been sworn, have you not, Mr. Leland?

The Witness: Yes, sir.

The Court: All right, proceed.

Direct Examination.

By Mr. Strong:

Q. You testified in this trial before?

A. Yes, sir.

Q. And you represent a sugar brokerage house?

A. I represent a brokerage house who handles sugar among other items.

Q. What house is that again?

A. Mailliard & Schmiedell.

Q. During June and July of 1946 were you refusing to sell sugar to anybody except customers already on the books of Mailliard & Schmiedell?

Mr. Carr: Objected to as being not proper rebuttal, immaterial, no proper way to present the rebuttal in the case. [451]

The Court: In view of the testimony, I think I shall allow the witness to answer.

The Witness: Will you state that question again, please?

The Court: Mr. Reporter, read it, please.

(Question read by the reporter.)

(Testimony of Albert F. Leland)

The Witness: No, we were not. We were selling sugar to any concern we could do business with that had ration evidence.

Mr. Strong: That is all.

Mr. Carr: That is all.

The Court: That is all.

Mr. Carr: Just a moment. Just a moment.

The Witness: I beg your pardon.

Cross Examination.

By Mr. Carr:

Q. You were not even selling sugar at all, were you? You were a broker?

A. Well, we are sales agents for Union Sugar Company.

Q. When you say that you were not selling it, why, all you did was act as an agent for the Union Sugar Company?

A. We were the sales force for the Union Sugar Company in Southern California.

Q. And you say now you would sell anybody in 1946?

A. Anybody that I knew and did business with and had ration evidence. [452]

Q. Why did you write "West Coast Supply Co." into that check?

A. I didn't write "West Coast Supply Co." into that check.

Mr. Strong: I don't think that is proper, your Honor.

The Court: That is proper. If anything has not been cleared up, I shall permit it to be cleared up.

Mr. Strong: Yes, sir.

Q. By Mr. Carr: Well, you remember the name "West Coast Supply" was put in on the check?

A. Yes, sir.

Mr. Carr: That is all.

Mr. Strong: That is all.

(Witness excused.)

Mr. Strong: Mr. Barry.

JAMES R. BARRY,

a witness for the Government, having been previously sworn, was recalled and testified further in rebuttal as follows:

The Clerk: You were heretofore sworn.

The Witness: Yes.

The Clerk: You are Mr. Barry?

The Witness: Barry.

The Court: James R. Barry. [453]

Direct Examination.

By Mr. Strong:

Q. What concern do you represent?

A. Parrott & Company.

Q. You testified here before? A. I did.

Q. During June and July, 1946, was your concern refusing to sell sugar to anybody except the customers already on the books?

Mr. Carr: Objected to as not proper rebuttal for the reason, first, that there is no testimony in the record by Mr. Ziegler to that effect in 1946. The only testimony is with reference to 1943 and '44.

I am quite sure I am right about that. He is rebutting something that never existed in the case.

(Testimony of James R. Barry)

The Court: Is that your understanding of the evidence?

Mr. Strong: No, that is not my understanding of the evidence. I understood Mr. Ziegler to testify as to the reasons why all of these transactions were taking place the way they did in July, 1946, was that the only way that you could get sugar from a sugar company was if you were an old customer on their books and that you could get it any other way. That is the reason he put the words "Partner—West Coast Supply Co."

Mr. Carr: That was back in 1944 when he put the word [454] "partner" on there, your Honor.

The Court: I have extensive notes, but I am not sure. It will not be difficult. It is not necessary to read the evidence on this one point.

Mr. Strong: I may save time, your Honor, by stating that if counsel will stipulate that the testimony as given applies only to 1945 or some period before July, 1946, I will withdraw this witness.

Mr. Carr: I don't want to take the burden. That is my recollection. I think it would be improper for me to do that. It is my understanding of the testimony it was.

The Court: All right, gentlemen. It won't take long to find it.

(The testimony of the defendant Paul J. Ziegler was read by the reporter as follows:

"A. . . There is another reason for the use of the word 'partner.' It was this: that the manufacturing business, which had theretofore been conducted by the West Coast Supply Company, was taken over by me, that is,

(Testimony of James R. Barry)

by the John H. Ziegler Company which is a partnership of my father and myself, on February 1, 1944.

“From that time on I was a partner in so far as the manufacturing business was concerned, and all of these papers relate to that manufacturing business. The name of the account, insofar as the OPA was concerned, was never [455] changed; and it was never changed because you had to have an established account with the sugar refiners in order to buy sugar at all in those days, and you also had to have a coincidence between the account which had been established with the sugar refiners and a check for ration points which you gave to them so that the name of the account with the OPA was never changed either on February 1, 1944, or thereafter. Had it been changed, I wouldn't have been able to buy sugar with points, without points or otherwise. . .”)

Mr. Carr: That is it. I still contend that I am right, if that is it.

The Court: Read the first part of it. It might give us an inkling.

(The record referred to was read by the reporter.)

The Court: Well, that does answer the question in my opinion.

Mr. Strong: Or thereafter, and the entire question is as to the use of certain documents on or about July 1st.

The Court: Yes.

Mr. Strong: In explanation of why the John H. Ziegler Company was not buying sugar and did not have any ration stamps this entire line of evidence went in, and in connection with that this witness was indicating by the answer to that question [456] that at this time he filed the papers or at any time thereafter he could not have

(Testimony of James R. Barry)

gotten any sugar if he was operating and buying under the name of John H. Ziegler Company and that is why he had to remain under the name of "West Coast Supply Company." That is why he says he never changed the name.

I want to show that you could buy sugar in June and July, 1946, regardless of what your name was if you had ration points and if you had the money. And it did not make any difference whether you had an account there or not.

The Court: But I think the defense also showed that at no time any contention was made that the John H. Ziegler Company had any ration points as a company. Is that not true?

Mr. Carr: That is right.

The Court: If they never had any ration coupons as a company, they could never have purchased any sugar.

Mr. Strong: Your Honor, as I understand the answer, he was giving an additional reason besides the ration points, the additional reason being that you could not get sugar if you were not an established account.

I want to show that you could get sugar in June and July, 1946; and that if the John H. Ziegler Company had any ration points, the mere fact that they were not an established account would not have prevented them from getting sugar. They could have obtained sugar.

Mr. Carr: But the trouble is Mr. Ziegler's testimony says [457] "in those days." Maybe I am in error, but as I understand it, Mr. Ziegler was talking about in those days back in 1944. There is no indication from that testimony that he was referring to 1946.

(Testimony of James R. Barry)

Counsel is now trying to bring that time up to 1946 and then rebut it, it seems to me, your Honor.

The Court: I do not believe, counsel, that—

Mr. Strong: Well, I will accept your Honor's ruling, of course.

The Court: I believe that that is not material, and the testimony of the defendant is that he makes no claim that the John H. Ziegler Company at any time had any ration points.

Proceed to the next question.

Mr. Strong: I have no further questions.

Mr. Carr: May I move to strike the testimony of this witness and the preceding witness, Mr. Leland, because of your Honor's ruling, because the other witness's testimony was based on the identical proposition as to the confusion in dates.

Mr. Strong: Yes, my question was directed toward the understanding of the evidence and the testimony of the previous witness was intended to cover the same point that I am covering with this one. If your Honor strikes his testimony, the other should go out also.

The Court: The motion of the defense shall be granted [458] and the jury instructed to disregard the testimony of both witnesses who have appeared on the stand this afternoon. That is all.

Mr. Strong: At this time, your Honor, without renewing my grounds, or anything, without making any further statement, I move to apply all testimony and exhibits heretofore introduced against Paul Ziegler also as against the defendant West Coast Supply Company.

Mr. Carr: Do I need to state the grounds for my objection, your Honor?

The Court: Just a moment. I want to find out where we are going from here as to our time.

Mr. Strong: I will rest at this point, your Honor.

The Court: How long does the Government and how long does the defense wish to argue the case to the jury? If you will give me some idea of that, I can properly determine the time for the balance of this case.

Will the Government give me some idea?

Mr. Strong: I would say about 45 minutes, your Honor, and about 10 minutes for closing.

The Court: You want about 45 minutes.

Mr. Carr, what do you feel you should have for proper presentation to the jury?

Mr. Carr: Did you say 45 and 10?

Mr. Strong: Yes. [459]

Mr. Carr: That is 55.

The Court: Yes, that is one hour, we will say, that the Government has asked for.

Mr. Carr: I don't know how much I will use, your Honor. I want to have some leeway.

The Court: I want it properly argued, gentlemen.

Mr. Carr: I don't want to crowd myself on the argument. I should like to feel free to have at least an hour and a half to an hour and three-quarters. I doubt if I will use the whole time, but I don't want to be perspiring under any last minute rush.

The Court: What I am trying to arrange, gentlemen, is to get the arguments, if I could, all in one session. I dislike to break up the arguments, and if we allowed an

hour and a half on each side, and if either side did not take up an hour and a half, we could get the arguments all in at one session.

That is the only matter with which I am concerned now: to arrange the time for the finish of the case.

I could not do it this afternoon without having just part of the argument.

Mr. Carr: Your Honor, I had some additional motions, you know.

The Court: I am not considering those at all. I am just considering the arguments to the jury. [460]

Mr. Carr: I see.

Mr. Strong: Well, I don't see how I can cut off much time from the 45 minutes.

I always find that if I say 30 minutes, I start crowding myself at the end; and sometimes if I say 45 minutes, I only take 30. There is some elasticity there. But it certainly won't be more than 35 or 40 minutes for the entire thing.

For the closing, since the defense is taking about an hour, I should have at least 10 minutes in closing.

The Court: The defense has asked for more time than that. The defense has asked for 15 minutes more than I thought they could probably conclude the argument in.

Mr. Carr: What did you have in mind?

The Court: An hour and a half.

Mr. Carr: I probably could do it. If I got toward the end, your Honor would be tolerant?

The Court: The only trouble is if I am tolerant, the other side will want me to be tolerant, too.

Mr. Carr: I shall try to confine myself to an hour and a half. I am sure I won't go over an hour and a half.

The Court: Lincoln made a great speech in 12 minutes.

Mr. Carr: There is a great difference between myself and Lincoln, both in height and style.

The Court: Well, all the argument will take some little time this afternoon, not a great deal, after which I think we [461] should take up the instructions, gentlemen. What I feel is the most expeditious way to handle this matter is to have the jury come back for the arguments and get them into one session.

Monday morning, of course, is always reserved for law and motion and setting of cases in this court. It is a rather crowded calendar usually. That takes the forenoon. I thought the jury would be better rested, and I should like to have the arguments then Monday afternoon and instruct the jury Tuesday morning.

Mr. Carr: I think that would work out very well, your Honor.

Mr. Strong: That is satisfactory, whatever your Honor says.

The Court: Well, we shall not crowd everybody that much. Otherwise I would have to keep the jury here until 6:00 o'clock or after, and I do not like to impose on the jury in that way; and I see no necessity for it.

The other matters are just matters of law until we get to the instructions.

Then we will agree on an hour and a half, gentlemen, for each side. You do not have to take all of that time; but if you do, I shall permit you to take an hour and a half on Monday afternoon.

Ladies and gentlemen of the jury, Saturday is a vacation day in the courts. Monday morning we have other matters always [462] on our calendars, what we call law

and motions, and matters of pleadings to be discussed, bills of particulars and other things in other cases. So the lawyers come here for that purpose.

Therefore, we could not have a session Monday morning. So with the consent of the Government and the defense, at the suggestion of the court I shall call you back at 2:00 o'clock on Monday. I think it perhaps would be better at 1:30 because we would be sure to get the arguments in and that would not press you so near to 5:00 o'clock.

I shall call you back when we recess today, which we will do immediately, at 1:30. The balance of the afternoon will be devoted here to legal matters involved in the case and to preparing the court's instructions for you which I will discuss with counsel for both sides.

The recess being rather long, may I again please call your attention to the admonition of the court. You will not discuss the matter with each other; you will not discuss it with anyone else or permit anyone to discuss this matter in your presence, and particularly you will not express or form any opinion at this time as to the merits of this controversy, which side is right or wrong.

I particularly emphasize that because, as I said in the beginning last Tuesday, the arguments of counsel are important. One counsel may call your attention to some exhibit or some [463] evidence that might possibly change your view of some part of the evidence; and you should not make up your mind then because you must get the law that applies to this case. Then after that is submitted to you under the instructions of the court, it is your duty then to determine a verdict that is fair to both the Government and to the defendant.

I am sure you will keep that admonition in mind. I mention that because in one instance we were trying a land case. During the week end one of the jurors decided to go and look at all the different pieces of land, where they were, and get people to tell the juror about the land and the value of it.

You see, that violates all of the proper procedure in court because the other attorneys have no way of knowing what is in that juror's mind. That juror absolutely violated a direction of the court.

You will now be in recess until 1:30 on Monday afternoon.

(Whereupon, at 3:00 p. m. the jury was excused to return at 1:30 o'clock p. m. Monday, February 10, 1947.)

(The following proceedings were had in the absence of the jury:)

The Court: Is there any objection by the Government or the defense to the statement of the court?

Mr. Carr: What was that, your Honor?

The Court: Is there any objection to the statement of the court? [464]

Mr. Carr: No, your Honor.

Mr. Strong: None, your Honor.

The Court: All right.

Mr. Strong: In connection with the motion I just made, may I just say a few words?

The Court: Yes.

Mr. Strong: I know the view which your Honor has already expressed in this matter, but I should like to add these thoughts with the hope, of course, that they will cause your Honor to change his view.

The concepts of responsibility of partners to each other, one for the acts of the other, whether they be civil or criminal, should have no place in the consideration of this motion whatsoever for this reason: that the ordinary concept of partnership simply recognizes that the only individuals who can do any acts are the humans, the partners. The name is simply a fictitious name used to describe the group which is operating as a partnership.

However, where the statutes, as in the case of the Second War Powers Act, specifically provide that a partnership is an entity for the purposes of violation or action in any way that a person under this law can be a partnership, that places the partnership entity, which is known here as the West Coast Supply Company, in precisely the same category as though it were a corporation under ordinary law. And here where there are three [465] individuals as partners, there are not only three persons who can violate the law, but there are four, each of the individuals being one of the persons and the partnership separately and apart from the three persons being another individual who can violate that law.

If the partnership as an entity can violate the law without regard to the acts of the partners, then obviously it is the act of some other person who can cause that violation since the partnership can perform no act of its own except through an human agency; and that would be an agent or anyone acting on behalf of the partnership.

The same rules, as I said, should apply here in determining criminal liabilities as applied to corporations and for exactly the same reasons. The corporation as an entity cannot act through the agency of some individual, and of course I need not go into the law as to the holding of a corporation guilty for the act of the various mana-

gerial officers and various supervisory officers, as well as the acts of the directors.

Here the partners are, in effect, as far as this statute is concerned and as far as criminal liability is concerned, in my opinion, in no different place than the stockholders of a corporation. The mere fact, of course, that a stockholder of a corporation did not authorize the act of one of the agents of the corporation has absolutely no relation to the question of whether the corporation is itself, as an entity, guilty of [466] a criminal offense when that act, whatever it is, which is the offense committed, is by a responsible agent of that corporation.

So that here in my opinion we have the same sort of situation. We have the partnership, West Coast Supply Company, a separate entity and standing on a par and on the same footing for the purpose of determining criminal liability as does a corporation. And I think the only question to be considered is whether the acts of Paul Ziegler are the acts of the entity, West Coast Supply Company, just as would be considered the acts of any managing officer or of any official of a corporation the acts of the corporation itself.

If your Honor agrees to view the question in that light, then I submit that the evidence here is sufficient to show, at least it is sufficient to go to the jury to have the jury determine as to whether or not the acts of Paul Ziegler were the acts of a person who had definite managerial and supervisory and official capacity to act on behalf of the entity, West Coast Supply Company; and if they determine it in the first instance that his acts are such as could be binding upon a separate entity, then they should determine whether his acts are acts of a violator of the law, in which case the entity is criminally responsible.

The Court: I have given this matter very serious consideration, when the matter was presented before, and stated my [467] view of the law from the bench. Yesterday during recess I had occasion to examine the authorities and presented authorities to counsel which sustained my position very clearly; the argument that the Government makes now would be a very forcible argument if this were a civil case holding the partnership liable for any acts of one of the partners.

But here this is a criminal action, and greatest care must be taken not to involve and to attempt to hold the partnership entity liable criminally for acts that the evidence does not disclose the partners who have been named had any knowledge of, and there is no evidence that the other partners of the West Coast Supply Company had any knowledge at all of these acts, whatever they were, whether the jury finds them to be irregular or not.

Secondly, there is no direct evidence here that the defendant, Paul J. Ziegler, was a partner. The acts which he performed in civil law probably would be sufficient, although it would be a very close line to establish his connection as a partner with the West Coast Supply Company.

The court feels that no case has been established against the West Coast Supply Company or the other members of that partnership. The relationship between that company and Mr. Paul J. Ziegler, under the evidence, is a matter for the jury under the testimony and the exhibits that have been placed in evidence. [468]

The testimony and the exhibits will be limited, therefore, to the activities and acts of the defendant, Paul J. Ziegler.

The court will deny the motion of the Government to permit these exhibits to apply to the West Coast Supply Company. The court, under the evidence, will dismiss the West Coast Supply Company.

Mr. Carr: May I address the court?

The Court: Yes.

Mr. Carr: Under the rules—

The Court: I was just going to reach for them.

Mr. Carr: I would prefer that your Honor follow that new rule because I don't know what the circuit is going to say about an interpretation of that rule. It says it should be an entry of a motion of judgment for acquittal.

The Court: That is right. That is what the rule is.

Mr. Carr: Shall I read it to your Honor or pass it up to you?

The Court: The court, after hearing the evidence, will direct a verdict of acquittal against the West Coast Supply Company.

I think it is Rule 27, Mr. Carr, is it not?

Mr. Carr: Here it is, Rule 29.

The Court: 29. Well, I had it in mind.

Mr. Carr: It reads:

“Motions for directed verdict are abolished. Motions [469] for judgment of acquittal shall be used in their place. The court on motion of a defendant or its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence. . . .”

The Court: Well, I have made that order.

Mr. Carr: That is, as I understand it, as to each and every count, your Honor?

The Court: Yes, that is right. And you want to renew your motion, Mr. Carr?

Mr. Carr: Yes. Your Honor's ruling is that the judgment of acquittal is now ordered entered in the case of the West Coast Supply Company on each and every count?

The Court: That is correct.

Mr. Carr: So then I shall address myself to the matter of Paul J. Ziegler.

Now, if the court please, I want, even if I have to presume a little upon the court's time, to very vigorously and as strongly as I can direct the court's attention to the proposition to which I am going to address myself.

First I will move that the court enter a judgment of acquittal on each and every count of the information, to-wit, eight counts, insofar as the remaining defendant, Paul J. Ziegler, is concerned, based upon the grounds:

First, that the information does not state an offense;
[470]

Secondly, that there has been a complete variance of the proof with the allegations of each and every count of the information;

Third, that the evidence is wholly insufficient to support a verdict of guilty on any of the eight counts of the information.

Now, specifically I have rather hurriedly touched some points, your Honor; but I want to point out to the court that we are here on one simple charge: the very specific allegation in this information.

Count One suffices to take care of the odd-numbered counts, One, Three, Five, Seven and, of course, Count Two represents Two, Four, Six and Eight insofar as the argument is concerned. The same problems obtain.

If the court please, this is a specific charge that is laid on a specific section of the Revised Ration Order No. 3, to-wit, 15.7 (d).

That provision has to be related, though, to the rest of the order; in other words, we have a situation where Congress has authorized the allocation of materials and said to the President, "You may set up an agency; and anyone who violates a rule or a regulation, once it is promulgated, shall be guilty of an offense, and so forth."

Now, the OPA has set up various requirements and various regulations. And among other things it has said, that no check [471] may be issued for an amount larger than the balance in the account on which it is drawn, less the amount of outstanding checks.

The elements of that offense are very simple, your Honor. But they are many.

First of all, the check cannot be issued, and the check is an OPA check. It does not mean just any kind of check. It has to be a check as defined by the regulations for an amount larger than the balance in the account on which it was drawn.

We take this information break-down and we find the charge that the defendant willfully issued and caused to be issued a sugar ration check.

The evidence now is such that I respectfully submit that there is not one iota of evidence in the record to show that a ration check has been issued as defined by paragraph (5) of Section 24.1.

It specifically says a ration check has to be a check, your Honor, drawn by a depositor. It has to be a depositor.

There is absolutely no evidence to show that Paul J. Ziegler is a depositor. There is a complete variance at

that point in the allegation. There is no proof that this is a sugar ration check within the very meaning of the definition of this revised ration order.

In the second place, the evidence shows conclusively that it was not drawn on the account of the West Coast Supply [472] Company. There isn't one doubt about that, your Honor. The check was signed "Paul J. Ziegler." "West Coast Supply Co." is something that got onto that check after it left his hands.

The Revised Ration Order says in paragraph (15) of Section 24.1:

" 'Issue' when used with respect to a check, means the delivery of a complete check. . . . "

So the word "issue" in this count is not sustained by the evidence. There has been no issue of the check within the very terms of the ration order. We cannot just segregate, your Honor, Section 15.7 (d) and let it stand alone. It has to stand in relation and juxtaposition to the rest of the various rules of this ration order, just the same as the crime of murder must stand in relation to other settled rules of criminal law.

Taking that count of the information you have a complete variance. It is stated in the information that it was drawn by the West Coast Supply Company. There is a variance there. There is absolutely no proof to sustain, in my opinion, at this time substantial evidence that it was drawn by the West Coast Supply Company. The Government has failed completely in that regard.

It goes on and falls down in another particular:

" . . . on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its [473] account at said bank in an amount insufficient to cover the amount of said check."

There is no relationship between the allegation of this information and the evidence because the West Coast Supply Company had nothing to do with this check, had nothing to do with the issuance of the check. It is not an OPA check at all. It is not a violation and cannot be on the evidence.

That is my opinion, if the court please.

That takes into account both a break-down of the information and a break-down of the evidence. I contend very strenuously that the Government, insofar as Counts One, Three, Five and Seven, has failed wholly to establish one material allegation of the information and, as a matter of fact, there is a complete variance in the proof and it warrants a judgment of acquittal being entered at this time.

With respect to Count Two, until the defendant takes the case, I believe the cases hold, the Government cannot fail in the case on its prosecution, that is, on the Government's case, and then make a case afterwards on the defendant's case.

The rule is, as I understand it, if there was no case when the Government rested, then the motion should be granted.

Now, let us take the situation, your Honor, at that time. There was not one iota of evidence that Paul Ziegler had ever received one pound of sugar. There was evidence, and it is documentary here, showing that the West Coast Supply Company [474] received the sugar.

In the second place this count alleges that it was an exchange for a sugar ration check. I do not need to repeat my argument there because under these very rules and regulations and the definition, there has been no check issued. Incidentally, in that connection "an account"

means under paragraph (1) of Section 24.1, Revised Ration Order No. 3:

“ . . . account carried by a bank, in which the bank keeps a record of deposits”

There has been no account established here upon which this particular ration check is drawn. I won't repeat that again.

There was no ration check, and it was not issued by the defendants. It was not issued by this defendant, Paul J. Ziegler, because it could not be issued in the light of those provisions I have read, plus the added provision concerning alteration.

I want to very specifically call your Honor's attention to this section because I think this section, irrespective of the others, is absolutely binding and controlling.

Section 15.7 says:

“A check may be issued only by a depositor. . . .”

Now, mind you, we are not being charged with a violation of that statute. We are being charged with an overdraft.

Mr. Ziegler was not a depositor, and the proof so proves: [475]

“ . . . only by a depositor and only for the purpose permitted and with the effect prescribed by Revised General Ration Order 5. . . .”

Maybe that was a violation of that particular section, but he is not on trial for that.

It goes on to define how checks shall be issued and postdated checks are prohibited; overdrafts are prohibited. This whole section 15.7 relates to offenses against whom? Only depositors, only people who actually have accounts.

There are many other rules and regulations which have to deal with punishing those people who violate the various ration rules and regulations.

When we come to (f) of Section 15.7, which is a limitation on this whole section, it says:

“Altered or mutilated checks. (1) no check which has been altered, (except as authorized in sub-paragraph (2) of this paragraph), mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check shall return it to the issuer with a request for a new check . . .”

In other words, Mr. Ziegler cannot be guilty of issuance of that check within the meaning of that section because the person who issued the check, insofar as the rules are concerned, contemplates those people who issued it with an alteration. It was not an issue of a check because it was not a completed [476] check when it left Mr. Ziegler's hands.

When it left his hands and it was altered by the parties who had those checks, it cannot be a check with an overdraft within the meaning of paragraph (d) of that same section.

In that connection the provision sets up what should be done in case the check is altered. The man must return it back to the original person who wrote the check, and if a check is to be issued at all, a new check must be issued.

I submit, if the court please, that the theory of this case from the very outset has been that if he can fire a shot and it hits the section, that is a violation. But we are not here to defend except on two specific charges. One is a charge under 15.7, and the other is a charge of

a ration order which incidentally I have never located yet, Order No. 8, 2.9. I called the OPA and I have tried every way in the world to get one of them, but I have been unable to find one. I don't think Mr. Strong has one.

Mr. Strong: There is one in the library, your Honor. It's always been there.

Mr. Carr: If the court please, I submit that the evidence is wholly insufficient to put Mr. Ziegler to the jury. And on top of that there is such a variance in the proof that the information cannot stand up as pleading, and that there is not charge against him at the moment which would support a verdict of this jury even if they brought in a verdict. [477]

The other point I must take up for a moment is on the reconversion. I have argued that, and I am not going into it in great length. But we have this situation:

We have to prove in this case that Paul J. Ziegler's business is an industrial plant; it is a small business operation. We have the testimony that, I think he said, they had 20 or 30 employees within the very terms of that act.

The reconversion act was set up because (and I think I know why Congress passed that act) some of the big people seemed to be running the programs and it seemed to work out that big business got the benefit somewhere along the line.

This act says, your Honor, and I just want to read, of course, keeping in mind it is a non-war use, and ending that sentence it says, speaking with reference to allocation of materials:

“. . . and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time. . . .”

In other words, Congress wiped out the historical base which OPA had set up in these very regulations for small business and said, "From now on you shall not say to a new business, 'you cannot have sugar simply because you were not in business prior to this time, but you must give them sugar and you must eliminate your rules and regulations which say you must have an historical base.'" [478]

I should like to read Section 1659, two short paragraphs of the War Mobilization and Reconversion Act. They are very short.

"(a) Whenever the expansion, resumption, or initiation of production for nonwar use is authorized, on a restricted basis, by any executive agency"

And mind you this is back in 1944.

". . . having control over manpower, production or materials, the restrictions imposed shall not be such as to prevent any small plant capable and desirous of participating in such expansion, resumption or initiation of production for nonwar use from participating in such production.

"(b) Whenever such executive agency allocates available materials for the production of any item or group of items. . . ."

And here we have a defendant charged in an information which sets up as a basis regulations predicated on the theory that a small business plant cannot have sugar except on an historical basis, directly in the teeth of the Act of the Congress.

I submit, if the court please, that every item of this ration order, Revised Order No. 3, is straight into the teeth of that act and invalid and cannot support an information or a conviction. [479]

The constitutional problem I told your Honor. I believe I have argued the emergency proposition under the Chastleton case. I made the offer of proof there.

I believe we have made the contention that the emergency did not exist and the further contention that the act says "for defense" and that now in 1946 the allocation of sugar was not for defense. But the main thing I want to come back to for just one word is this:

That there has been a complete variance in the proof in this case, and there is no evidence to support the Government's case: the fact that Ziegler ever received a pound of this sugar.

And I submit, your Honor, respectfully submit, that this is the proper posture of the case, to instruct the jury or rather under the new rules to enter a judgment of acquittal.

The Court: The motion will be denied and exception will be allowed the defendant.

Will you bring in the instructions from my desk?

Mr. Strong: May we have a five minute recess before we start? I don't think we had an afternoon recess.

The Court: Do we need a recess?

Mr. Strong: I do.

The Court: All right.

(Brief recess.)

The Court: Let the record show that the jury is not present and that the attorney for the Government and the [480] attorney for the defendant are present.

I have read the proposed instructions by both the Government and the defendant, gentlemen.

We will first consider the instructions offered by the Government.

Mr. Carr, will you please let me have your objections?
I shall make one or two observations.

On page 11—the pages are not numbered by the Government; so I have numbered them from 1 to 14, inclusive—in the second paragraph, of course it is improper for the court to instruct the jury with reference to the penalty.

Mr. Strong: Yes. That is a mistake, your Honor. It should be out.

The Court: Certainly. So there will be stricken from that second paragraph the words:

“ . . . and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”

On page 1, Mr. Carr, have you any suggestions?

Mr. Carr: Not up to there, but the latter portion:

“For the purposes of this section, the term ‘any person’ . . . shall include any individual, partnership, association, business trust, corporation. . . .”

and so forth.

That has no bearing on any defendant involved in this case. [481] I do not know why the partnership section would be applicable there at all.

I object to the use of that on the ground it would be confusing to the jury. There is no partnership involved.

The Court: Yes. I do not believe that that is important now because the only purpose of putting it in, Mr. Strong, in my opinion, was to cover the partnership.

Mr. Strong: I agree to have it stricken.

The Court: I shall strike it out.

Page 2, Mr. Carr?

Mr. Carr: The first part I won't object to, but the second part I have to, as a matter of record, your Honor.

The Court: Yes, to save that objection as to whether or not he is the successor.

Mr. Carr: That objection to the successor, also to the validity of the regulation and the objection that at that particular time that the offense is charged that the efficacy of the OPA to administer as an agency or as to the regulations promulgated by them at the time, that no such power existed.

The Court: I shall have to deny—

Mr. Carr: It is a constitutional question, in other words.

The Court: Yes. I shall have to deny the motion in view of the recent case of Jack Parker, Isidor M. Saks and Melvin Caplan et al., petitioners, v. Philip B. Fleming, Temporary [482] Controls Administrator, opinion handed down January 20, 1947, in which the court states in a foot-note:

“The original respondent here was Paul A. Porter, Price Administrator. The functions of his office have been assumed by Philip B. Fleming, Temporary Controls Administrator, who has been substituted as respondent.”

And also in view of the opinion by the United States Emergency Court of Appeals in re William M. Morrison, et al., v. Philip B. Fleming, Temporary Controls Administrator, petition for re-hearing, filed January 16, 1947, also recognizes the power and authority of Philip B. Fleming as the Temporary Controls Administrator.

However, Mr. Carr is right in protecting the record on that.

Mr. Carr: May I have that citation, your Honor?

The Court: Which one, Mr. Carr?

Mr. Carr: I did not get that.

The Court: The Emergency Court or the United States Supreme Court?

Mr. Carr: Both of them, your Honor, if I may have them.

The Court: The October term, 1946, *Parker v. Philip B. Fleming*, Temporary Controls Administrator; and the opinion is dated January 20, 1947. The opinion is by Mr. Justice Black.

Mr. Carr: Yes, your Honor.

The Court: And the other, United States Emergency Court of Appeals, opinion by Judge Maris, Chief Judge, [483] is case No. 352, *Christine Collins, et al., v. Philip B. Fleming*, Temporary Controls Administrator; No. 353, *Adolph Hirsch v. Philip B. Fleming*, Temporary Controls Administrator; *William M. Morrison, et al., v. Philip B. Fleming*, Temporary Controls Administrator, and a petition for re-hearing was filed January 16, 1947. Of course, the decision is not material to the point that the court is mentioning to counsel.

Now we will take up page 3, Mr. Carr. Any suggestions on page 3?

Mr. Carr: My same objection there: that at the particular time there was no constitutional authority for the existence of the OPA.

The Court: Yes. Let the record so show. Overruled.

And on page 4? The same objection to that one, Mr. Carr? I assume the same objection.

Mr. Carr: Excuse me, your Honor. I was just writing something.

The Court: You would have the same objection to page 4, would you not?

Mr. Carr: Yes, I object to that on the ground that there was no constitutional authority for the executive order at that time.

The Court: Overruled. That will be given.

Now, on page 5?

Mr. Strong: As to that, your Honor, may I suggest that [484] everything should go out except Section 2.9 which begins at line 21, ending line 25?

Line 6 should stay in. In other words, it would read: "General Ration Order No. 8 in part provides as follows"

Then it jumps down to Section 2.9.

The Court: Yes. But we have to strike out part of the last paragraph, too.

Mr. Strong: Yes, the last paragraph to be stricken out, beginning at Section 3.1.

Mr. Carr: Let us see. That leaves 2.9 still in?

The Court: Yes.

Mr. Carr: You are striking out the part about—

Mr. Strong: Section 3.1.

Mr. Carr: How about the end of that ". . . it was not acquired in accordance with a ration order by the person tendering it"?

Is that coming out, your Honor?

Mr. Strong: No, I want it in.

Mr. Carr: There is no charge to that effect.

The Court: Mr. Strong, there is not any charge that the original rationing orders in that account were not properly issued by the OPA. Is that not the point?

Mr. Strong: That is true. There is no charge in that respect. But Mr. Ziegler's chief defense is that he issued [485] rationing orders on an account which was not his, and he had nothing to do with it.

The Court: Wait until I read it again.

Mr. Carr: There just is not any charge, your Honor, that involves that last sentence at all.

Mr. Strong: The basic prohibition, your Honor, is against the receipt of a rationed commodity in exchange for a ration document:

“No person shall . . . receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it.”

The defendant in this case certainly, under the facts, can be held to have acquired sugar, received a rationed commodity not acquired in accordance with the ration order by the person tendering it.

The Court: Let the record show Mr. Carr's objection. Overruled. It will be given.

Now, instruction No. 6?

Mr. Carr: Your Honor, on that last section 3.1, your Honor, that is at the bottom of the page: is that out?

The Court: That is out.

Mr. Strong: That is out.

Mr. Carr: I see. [486]

Mr. Strong: Page 6, your Honor.

The Court: Page 6, Instruction No. 6.

Mr. Strong: Page 6, Instruction No. 6, yes. I think everything should be out on that page except the first two lines and then we go over to—

The Court: Wait a minute.

Mr. Strong: I am sorry.

The Court: You are asking, Mr. Strong, the court to give all of Section 1.1 on page 6?

Mr. Strong: No, just the words "Third Revised Ration Order No. 3 . . . provides in part as follows . . ."

And I think that the only section that charges, the one on the next page, is 15.7 (d), beginning at line 4.

The Court: 15 point what?

Mr. Strong: 7 (d) which begins at line 4, your Honor.

The Court: If it goes out, I am sure Mr. Carr will not object. Instruction No. 6 is out, to and including the two lines on page 7.

Mr. Carr: That leaves in Section 15.7 (d)?

The Court: That is right. That is what we are discussing now.

Mr. Carr: Now, I submit that Section 22.10—shall I take it up?

The Court: Take up the first paragraph.

Mr. Carr: Section 22.10, your Honor; [487]

" . . . No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks . . ."

That is an entirely different offense and has no bearing on this charge at all, the charge that is made in the information.

Mr. Strong: That may go out, your Honor.

The Court: Yes, I think you are right.

Mr. Strong: The next section can come out, too.

The Court: All right.

Mr. Carr: Section 24.1 (c) Definitions: I have no objection to that. That is at the bottom of the page, your Honor.

The Court: Yes. But on the next page where it defines "Person," I think there is no reason for that any longer.

Mr. Strong: No, that should come out.

The Court: On page 8 "(16)" may go out.

Mr. Carr: Yes, your Honor.

The Court: And "(19)" is already defined in page 2 of the instructions. I see no reason to give it.

Mr. Strong: Your Honor, may I consider page 6?

The Court: Yes, you may consider anything you want to.

Mr. Strong: I think Section 1.1 should stay in.

Mr. Carr: Well, I submit that I must object to that because that is an entirely different offense. It would be [488] easy for the jury to confuse that with the offense charged in the information.

I object to it on that ground.

The Court: The defendant is not informed against for having received the sugar without a proper rationing check, is he, Mr. Strong?

Mr. Strong: Yes. He did "willfully and unlawfully receive a rationed commodity . . . in exchange for a ration document . . ."

Mr. Carr: Well, if your Honor please, this is an entirely different ration order. This is Ration Order No. 3, and the charge on that particular phase is under Ration Order No. 8.

So he is citing the section from Ration Order No. 3 which the jury might confuse as being applicable as an offense under Ration Order No. 8.

Mr. Strong: Well, I don't think that it makes much difference since it is covered by Section 15.7 (d).

The Court: All right, it is out, then.

Paragraph (19) on page 8 I have stricken out. It is repetitious. You have it on page 2, Mr. Strong.

Mr. Strong: Yes, your Honor.

The Court: I should like to avoid repetition if I can.

Now, on page 9, Mr. Carr?

Mr. Carr: Well, I object to that instruction on the ground that it is not the law of the Circuit, your Honor, in [489] that it brings up the question—let me just point specifically to what it says—and it reads:

“ . . . intentional, conscious doing of the act prohibited; that is, intending the result which actually comes to pass . . . or conduct marked by careless disregard as to whether or not one has the right so to act . . . ”

I think the instruction is misleading there. I do not think that is the law. It has to be willful, deliberate and obstinate where the word “willful” is used.

The Court: Well, I shall read an instruction on willfulness from the Supreme Court of the United States. Let us see if either counsel objects to this.

This is from *Armour Packing Co. v. United States*, 209 U. S. 56 at 85:

“You are instructed that under the statutes involved in this proceeding it is necessary, in order to find the defendant guilty, that you find he violated the law willfully. The word ‘willfully’ as used in the information means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing it lawful or, in other words, marked by careless disregard as to whether or not one has the right so to act.

“To express it in another way, it means purposely or obstinately or designed to describe the attitude of [490] a person, who, having a free will or choice, either intentionally disregards the law or is plainly indifferent to its requirements.”

That is the United States Supreme Court speaking.

Mr. Strong: That is almost in the words of my instruction, your Honor.

Mr. Carr: Is that a statute involved there in that case, your Honor, that required willfulness?

The Court: It only defines the word “willfully.” It does not pertain to a particular; it just defines the word “willfully,” what is meant in the law by “willfully.”

Because attorneys all have different wordings for “willfulness,” I spent considerable time in going through to find a definition by the Supreme Court of the United States, gentlemen; and that is the one I found.

Mr. Strong: It is satisfactory to the Government, your Honor.

The Court: But Mr. Carr might find some objection to it.

Mr. Carr: Your Honor, I don’t want, naturally, to refute the Supreme Court’s instructions if that was the instruction that was given in a case where “willfully” is required by the statute to—

The Court: It says:

“The word ‘willfully’ as used in the information means an intentional . . .” [491]
and so forth.

Mr. Carr: I just—

The Court: Go ahead. If you think that is not right, get your objection in here.

Mr. Carr: Well, I think I will have to object to that, your Honor. I hate to say the case is—

The Court: Go ahead, put it in.

Mr. Carr: Shall I make my objection?

The Court: Yes, Mr. Carr.

Mr. Carr: Is there an instruction, your Honor, that says it does not require the defendant to have actual knowledge?

The Court: I am not going to give that instruction.

Mr. Carr: That is going to be my objection.

The Court: Yes. I am not going to give the instruction submitted by the Government on page 9. I am going to give the instruction I have read to you from the opinion of the Supreme Court in *Armour Packing Co. v. United States*, 209 U. S. 56 at 85.

Mr. Carr: Yes.

The Court: And now you want to make your record on that?

Mr. Carr: I think I have already done that. I was referring to Government's Instruction No. 8, your Honor.

The Court: All right.

Mr. Carr: The next instruction where it says that "the law does not require the defendant have actual knowledge of [492] the provisions of the Second War Powers Act of 1942, of General Ration Order No. 8, or of the 3rd Revised Ration Order No. 3, governing the rationing of sugar"

It also says:

"All persons, including those who use or deal in sugar, are charged by law with notice of the statute and ration orders and their contents because of publication"

Well, I don't think that fully states the law.

The law is that there is a presumption and that there is a rebuttable presumption which is covered in one of our instructions.

Mr. Strong: If your Honor please, a rebuttable presumption has nothing to do with knowledge. I have checked the statute, and if your Honor will look at the statute you will find that rebuttable presumption is as to publication, printing, not as to knowledge. There is no presumption that is rebuttable as to knowledge.

The Court: Very well. What is your number of the instruction, Mr. Carr?

Mr. Carr: You mean the one that I am looking at now?

The Court: No, the one you think explains in some measure this one?

Mr. Strong: No. 22, your Honor.

Mr. Carr: Yes, sir, No. 22.

The Court: All right. Mr. Strong, I shall hear you on [493] defendant's requested instruction No. 22.

Mr. Strong: That instruction incorrectly states the law, and I should like to read the law to your Honor.

The Court: All right.

Mr. Strong: That instruction shows that it is drawn from Title 44, U.S.C.A., Section 307; and that is what I am reading now.

Title 44, United States Code Annotated, Section 307, says:

"Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation"

That is the caption. Then it says:

“No document required under Section 305 (e) of this chapter to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in Section 302 of this chapter; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under Section 305 of this chapter, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected [494] thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed thereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.”

Obviously from that the presumption which is rebuttable is not as to knowledge which is sufficient once it is published but the rebuttable presumption is only as to the issuance, promulgation, filing, being a true copy, the requirements and regulations relative to the document being put in.

So that instruction is wholly inconsistent with the law when it seeks to make out of the knowledge of the order a rebuttable presumption.

Mr. Carr: Well, I am not in accord with counsel on his interpretation.

Mr. Strong: May I hand this book to your Honor?

(Counsel hands book to the court.) [495]

Mr. Carr: Your Honor, could I ask the bailiff to get a couple of citations?

The Court: Yes.

Mr. Carr: 145 Fed. (2d) and 151 Fed. (2d).

(Brief pause in the proceedings.)

Mr. Strong: May I state to your Honor further, while counsel is looking at the book, that if counsel's construction of the Federal Register publication constructive notice section is correct, then in all instances ignorance of the law would be an excuse, since every defendant could take the stand and say that he had no actual knowledge. And that course would then come within the provision called for by this instruction that that is a presumption but it is a rebuttable one, and he simply rebuts it by saying, "I didn't know about it."

That would eliminate the publication in the Federal Register.

Mr. Carr: I want to read this language from the Ninth Circuit.

This is the case of *Flannagan v. United States*, 145 Fed. (2d) 740:

"Nor was there error in denying appellant's motion for an instructed verdict for insufficiency of the evidence to warrant conviction. The evidence shows the appellant

a peddler truck seller, buying from packers and selling his meat, here the side of beef, 'beef wholesale cut,' [496] to retailers of meat, here to Kilduff, operating a market in Anahime, California. Appellant is charged with knowledge of the maximum price fixed by Regulation 169, since on June 9, 1943, prior to the sale, the regulation, as amended and to take effect on June 19th, was published in the Federal Register. Such publication created a rebuttable presumption of notice to appellant"

In other words, he did not rebut the presumption in this case.

The Circuit Court said it created a rebuttable presumption. The facts show that he did know. There wasn't any rebuttal.

Here it is again in this case, your Honor, in *Kempe v. United States*, This is the Eighth Circuit.

The Court: 151 Fed. (2d) 680?

Mr. Carr: Yes, in which they refer on page 684:

"The information plainly advised the defendant that he was charged with violating certain specified regulations and statutes The defendant was charged with knowledge of Ration Order No. 5C, which he was accused of violating by Count III; likewise, he was charged with knowledge of the maximum price of gasoline as fixed"

by a certain regulation.

". . . since both of these regulations had been published in the Federal Register and the volume and page were set forth in the information. Such publication created a [497] rebuttable presumption of notice to the defendant"

Citing the *Flannagan* case.

I think it does have very specific application. In other words, if it is a rebuttable presumption, your Honor, and this defendant had no knowledge of the act and he rebuts that, it seems to me that that is the very reason of the willful feature in the act.

Mr. Strong: If your Honor please, following both of those portions that counsel has read, there has been parenthesis in those cases in reference to this section, is that right, counsel, 44 United States Code Section 307?

Mr. Carr: Oh, I am sure there is, yes, yes.

Mr. Strong: What the court has said there is not inconsistent with what I have said at all. I do not deny that there is a rebuttable presumption in connection with publication, but my position merely is that it is not a rebuttable presumption as to knowledge but a rebuttable presumption as to the requirement with compliance to complete and effectuate the publication. That is all that that section says and that is all that this court points to.

This court, the Ninth Circuit, has not said that there is a rebuttable presumption as to knowledge but simply notice, and in order to give notice it must be done in conformance with the requirements.

Therefore, I again submit that the instruction requested [498] is incorrect.

The Court: I will pass that for the present, gentlemen, and have both counsel see if they can submit an instruction that will embody those expressions and also the statute to which my attention has been called.

You were discussing Instruction No. 8, gentlemen, of the Government, page 10?

Mr. Strong: Yes.

The Court: I shall mark that "passed now" and take it up later tonight or some other time.

Government's Instruction No. 9 on page 11. Mr. Carr?

Mr. Carr: Well, I object to that on the ground it does not sufficiently state the elements of the offense.

The Court: I have some instructions on that.

Mr. Carr: Yes, your Honor.

Mr. Strong: I think it is your instruction 24, Mr. Carr.

Mr. Carr: Mine is No. 24, your Honor.

Mr. Strong: Well, I have no objection to substituting 24 for my Instruction No. 9.

The Court: All right.

Mr. Strong: Except, your Honor, that on line 18 of defendant's instruction 24—

The Court: There is nothing wrong with that.

Mr. Strong: Well, I assume that material allegation refers only to those that are not surplusage. [499]

Mr. Carr: Then, your Honor, No. 25—

The Court: Wait until I get my record straight on this.

Let the record show that the Government consents to the substitution of the defendant's requested instruction No. 24 for the Government's requested instruction No. 9.

Mr. Carr: The same objection, your Honor, to the next one.

Mr. Strong: Yes, we consent to that.

The Court: That is the same.

Mr. Carr: My instruction No. 25.

Mr. Strong: I will agree to the substitution.

The Court: All right. Let the record show that the Government consents to the substitution of the defendant's requested instruction No. 25 for the Government's requested instruction No. 10.

All right, we pass on now to page 13 of the Government's instructions, No. 11.

Mr. Carr: Well, this instruction, your Honor—may I just briefly refer to it?

The Court: Well, I shall point out a few objections, and then, Mr. Carr, you will have the whole matter in front of you.

Mr. Carr: Very well, sir.

The Court: On line 12 after the words "behalf of" I have stricken out two words "either of" and I have stricken out the "s" on "defendants" and in the same line I have inserted above the word "defendant" "Paul J. Ziegler." [500]

And on line 13 I have stricken out the word "defendants, or defendant" and I have inserted the words "Paul J. Ziegler."

Those are my insertions. Now you have the whole instruction before you, Mr. Carr. And in line 19½ I have stricken out the words "or defendants."

Mr. Strong: The same, your Honor, should be done on line 15.

The Court: And I have done the same on line 15.

Mr. Strong: That is agreeable to the Government.

The Court: You have the whole instruction now, Mr. Carr.

Mr. Carr: Well, I will have to object to that on the ground, your Honor, that it is an erroneous instruction in that it does not comply with the charge set up in Counts Two, Four, Six and Eight in that the way I read that instruction it makes an offense if Paul J. Ziegler received sugar, and it confuses the West Coast Supply Company account. In other words, there is no longer any account of the West Coast Supply Company. The evidence is

such that that is not involved in the case because under that instruction, your Honor, we are apt to convict the defendant.

The Court: On line 8 strike out "s" on "defendants" and the following words "or either of them" are to be stricken out.

Mr. Carr: Do I make myself plain, your Honor? In other words, this instruction does this to the defendant: obviously there was nothing in that account. He had no account, and the [501] check was drawn by Paul J. Ziegler.

This instruction makes it so that if those checks were an overdraft on the West Coast Supply Company account, then if the jury believes that, they must convict him. And I contend that that is not the charge, nor can he be convicted on an overdraft on the West Coast Supply account.

For that reason the instruction leaves out an element of the offense.

The Court: What element?

Mr. Carr: Well, it makes him subject to conviction for merely signing the check and receiving sugar. That is not the charge.

In other words, if there is an overdraft on the West Coast Supply Company account, he is liable; and that is not the charge under Section 15.7 (d). That is where the variance comes in, your Honor.

The Court: Suppose the jury found that the only account there was was the West Coast Supply Company, and Exhibit 2 authorized Paul J. Ziegler to draw on that account; also that he issued these checks on the West Coast Supply Company and signed his name, would that not be covered in this particular instruction?

Mr. Carr: Well, I contend that that would not be an offense, your Honor. And that is the reason I contend that it would not be an offense under the counts involved, and that is [502] the reason I say the instruction is fallacious.

The Court: Mr. Strong, what do you have to say about that?

Mr. Strong: The instruction as it now stands I believe is correct, your Honor, because I believe it would be an offense, regardless of whether the defendant did or did not insert the name "West Coast Supply Company."

I think the jury can properly find that he intended to have somebody insert something if he did not do it himself in order to make the check a completed check so that he could draw on the account. He obviously was not issuing this paper for any other reason except that it be used as a ration check.

If the defendant's position, as expressed by Mr. Carr, is the correct law, then I submit that the defendant has used the only way of getting around the requirement that ration currency be given in exchange for the purchase of sugar. I do not think that that is the law, your Honor. I do not think that it contemplates that any sugar can be obtained without the use of ration currency.

The Court: Let me read it carefully now.

"Concerning each of Counts Two, Four, Six and Eight of the Information, if you believe beyond a reasonable doubt that on or about the dates alleged in the Information, the defendant did on those dates, willfully receive, or cause to be received the amount of sugar indicated in each of the Counts, in exchange for a sugar [503] ration check drawn by or on behalf of . . ."

That would have to be—

Mr. Strong: I think maybe we can add, your Honor, “by or on behalf of the defendant Paul J. Ziegler on the West Coast Supply Company account” to clarify it.

I would have no objection to that, if that is what counsel wants.

Mr. Carr: No, I object to that instruction in its entirety. I think it is misleading. I do not think it covers the offense that is alleged in Counts Two, Four, Six and Eight; and I don’t think that it sets up the elements of the offense.

Mr. Strong: If your Honor wishes, I can try to reframe it and produce on Monday a reframed one.

The Court: I am trying to reframe it here to bring it within the terms of the information. But I have rather badly mutilated it; so we will pass it.

Mr. Strong: Thank you.

The Court: Mr. Carr, let us have your objection, if any, to Government’s Instruction No. 12.

Mr. Carr: Let’s see.

The Court: I have stricken out “s” in line 9, and I have stricken out “or either of them” in line 9 and I have inserted above it “Paul J. Ziegler.”

I have stricken out in line 13½ “or defendants” and I have stricken out in line 17½ “or defendants.” [504]

Mr. Carr: Well, your Honor, I have to on my theory of the case object to that because of that variance between the evidence and the information. At least my position is that.

The Court: Yes, I understand.

Mr. Carr: And it does not properly state the elements, all of the elements, in view of the offense charged.

The Court: All right, let the record so show.

Mr. Carr: That is overruled, your Honor?

The Court: Yes. Let Mr. Carr's objection show in the record.

All right, take up the defendant's instructions.

Mr. Strong: I assume, in connection with the defendant, that your Honor will give your Honor's usual general instruction?

The Court: Yes. I shall indicate it. I think Mr. Carr is familiar with my instructions.

Instruction No. 1 is given in my general instruction, Instruction No. 2, Instruction No. 3, No. 4, No. 5, No. 6, No. 7.

Mr. Carr: 6 and 7?

The Court: And 7.

Mr. Strong: 8 is the same as 4, almost.

The Court: I give that in different parts of my instructions. I say:

"The defendant is presumed to be innocent at all stages of the proceedings until the evidence produced on behalf [505] of the Government shows him guilty beyond a reasonable doubt. The burden is not upon the defendant to establish his innocence."

That is a new expression I have added to my instruction. I find the authority in 143 Fed. (2d) at 681:

"This rule applies to every element of the offense charged. Mere suspicion or mere probability will not authorize a conviction. Reasonable doubt in such doubt . . ."

Then I have the general instruction on reasonable doubt.

Mr. Carr: In other words, you cover, your Honor, "partial comparison and consideration of all the evidence"?

The Court: Yes. In another part I have covered that.

Mr. Carr: I have always liked that. I don't know. It may just say:

“ . . . you can truthfully say you have an abiding conviction of the defendant's guilt”

The Court: And

“ . . . whenever, after careful consideration of all the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.”

That is mine.

Mr. Strong: That is satisfactory to the Government.
[506]

Mr. Carr: I do not think it would be in error if your Honor does not give this.

The Court: I have covered that pretty strongly in that section there.

We will take up No. 8. I give that in general language.

As to No. 9, I have just read you mine on that; and I express it in other ways. No. 9 is given in substance.

No. 10 is given in substance.

No. 11 is part of my general instructions.

Now, as to No. 12, gentlemen:

“You cannot find a defendant guilty upon any count of the information unless you are convinced, beyond a reasonable doubt, by the evidence of the truth of every material allegation of such count.”

I just read you that in my instructions.

Mr. Carr: If that is covered, your Honor, there is no need of giving it.

The Court: No. Now, let us read No. 13:

"The Court advises you to find the defendant, West Coast Supply Company . . ."

Mr. Carr: That is out.

The Court: Yes, that is out.

Mr. Strong: We object to No. 14.

The Court: What?

Mr. Strong: I thought your Honor was going to No. 14. [507]

The Court: No, No. 13.

No. 14:

"The Court advises you to find the defendant . . . not guilty . . ."

Not given, exception allowed to the defendant.

Mr. Carr: That is on 14?

The Court: No. 14, yes.

No. 15: I give that, gentlemen, in my general instructions. That is all right.

As to No. 16—

Mr. Strong: I object to 16, your Honor.

The Court: Well, it should be revamped in some measure. I have a note here.

Mr. Carr: Of course, that is our theory of the case, your Honor.

The Court: That is right. Not given, exception allowed to the defendant.

Mr. Strong: We object to 17, your Honor.

The Court: What is the objection to 17? On the face of it it looks to me to be all right.

"You are instructed that a sugar ration check may be issued only by a depositor, that is, by a person who has a ration bank account, against his account. Even if you should find beyond a reasonable doubt that the defendant, Paul J. Ziegler, in fact, did issue or cause [508] said ration checks to be issued, you cannot find defendant Paul J. Ziegler guilty unless you are convinced, beyond a reasonable doubt, that he is either a depositor or that he was authorized by defendant West Coast Supply Company to issue checks to be drawn on its account."

Mr. Strong: I withdraw my objection. I am sorry.

The Court: Yes, I think that is all right.

Mr. Strong: Does your Honor want to leave in the words "defendant West Coast Supply Company"?

Mr. Carr: I guess that will have to come out.

Mr. Strong: Just the word "defendant."

Mr. Carr: The instruction may be wrong now.

The Court: No, I think that has to stay in because you are dealing with that account.

Mr. Carr: Let me have just a moment, your Honor.
(Brief pause in the proceedings.)

The Court: If they find he was not authorized by the West Coast Supply Company, why, of course, under this instruction he would not be guilty.

Mr. Strong: I assume the word "defendant" is merely descriptive to designate West Coast Supply Company.

Mr. Carr: The only trouble with that, your Honor, is that now our contention is that since all the evidence is in—I drafted an instruction, earlier, you know—that now that there is no evidence whatsoever before the jury to show an [509] authorization—

The Court: I think that card does.

Mr. Carr: I mean in a criminal case, your Honor. I think that is where the problem comes in. It might for a civil matter. That I can understand. But for a criminal case I think it raises—may we pass that one and see if I can revamp that?

Mr. Strong: I would like it given as is now.

The Court: I shall strike out “was authorized.” I shall strike out the word “defendant” on line 10 because the West Coast Supply Company is not a defendant.

Mr. Strong: Yes.

Mr. Carr: May I try to revamp that, your Honor?

The Court: All right, we will pass it.

No. 18: I have already given you the instruction I am going to give with reference to willfulness.

As to No. 19—

Mr. Strong: The Government objects to 19.

The Court: Defendant’s requested instruction No. 19. Well—

Mr. Carr: I assume that on the first part of that instruction your Honor has indicated the contrary ruling on that first part, the first paragraph from your previous rulings?

The Court: That is right. [510]

Mr. Carr: It may be we have confused two things in that instruction, your Honor. They ought to be broken down. If so, your Honor can pass it. There are really two things in there, I am afraid.

The Court: We will pass it. No. 18 is passed.

Defendant’s requested instruction No. 20?

Mr. Strong: Objected to by the Government. The definition of “willfully” is already given by your Honor.

The Court: Yes, I have covered that. The same case is cited in support of it.

No. 21?

Mr. Strong: Objected to by the Government as not the law.

The Court: That is Mr. Carr's theory, though.

Mr. Carr: Yes, that is our theory, your Honor.

The Court: Not given, exception allowed to the defendant.

Mr. Strong: Did your Honor say "not given"?

The Court: Not given, exception allowed the defendant.

Defendant's requested instruction No. 22?

Mr. Strong: That was passed, I believe, for revision.

Mr. Carr: No.

The Court: Yes, I have marked "hold" on that.

Now we will take up No. 23. No. 23 will be given.

Mr. Strong: Did your Honor say "will be given"?

The Court: Yes.

Mr. Strong: We object to it for this reason, your Honor— [511]

The Court: I have marked it "okay" here. What is the objection to that?

Mr. Strong: Well, I don't think the juror should be instructed to stand by his decision once he reaches it.

The Court: That is not in here, is it?

Mr. Strong: On line 8.

Mr. Carr: The law of the land and this instruction are older than I am, your Honor.

The Court: It is not very old, then.

Mr. Carr: Well, it's been given for at least 40 years around here.

The Court: Well, here is mine, gentlemen:

"However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Upon retiring to the jury room you will select one of your . . ."

Mr. Strong: That is satisfactory to the Government.

Mr. Carr: I will ask that that instruction be given, your Honor. It is an instruction that is going back sometime. I remember Judge James used to give that instruction invariably, [512] and I think it has come down through the annals of this court and I think it is a very just and proper one. It tells them to stand their ground when they believe something but not be averse to listening to their fellow jurors; that they should not surrender their independent judgment but they should listen.

The Court: I say: "You should not surrender your honest convictions . . ."

I say that.

"In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors . . ."

Mr. Carr: I just don't think it covers it fully enough, your Honor. I respectfully ask you to give this one.

The Court: What further now would you add to that?

"If you arrive at another conclusion, don't let anybody change your mind"

that is what you want?

Mr. Carr: "If, after such a full and fair discussion with them, any juror still satisfied that a decision is right, he should say so by his verdict. If, on the other hand, after such full and fair discussion any juror is satisfied that his original decision was wrong, then he should unhesitatingly abandon such decision and render his verdict according to such final decision." [513]

I believe, your Honor, I have run into this many times. Jurors get the impression that they would vote with the majority.

The Court: I tell them not to.

Mr. Carr: And unless they get that plain, it often happens. I have had them tell me,

"I didn't know that you could have a disagreement."

The Court: And I say further:

"It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without any violence to your independent judgment. To each of you I would say that you must decide the case for yourself but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous."

I have given that for six years now.

Mr. Carr: Your Honor, I am not criticizing your instruction.

The Court: No, you have that right, Mr. Carr. I want you to.

Mr. Carr: I will tell you very frankly, in a certain case that was tried in your Honor's court I talked to a woman juror afterwards, and she said, "Well, I didn't know that you could disagree in those cases. I thought you had to [514] arrive at either a guilty verdict or a not guilty verdict."

The purpose of that particular phrase in there about "stand by your decision" is, to me, very important in a criminal case.

The Court: Well, you may reverse me.

Mr. Carr: No, I don't know about that, your Honor, on that instruction.

The Court: If I change that general instruction—I have given it for six years—I think I should rewrite it and give it in accordance with this other suggestion. And I hesitate to do that.

No. 23, gentlemen, I have decided.

The next one I have is No. 26.

Mr. Strong: Nos. 24 and 25 were agreed before, your Honor.

The Court: All right. No. 26: Well, let me hear about that.

Mr. Strong: I object to that, your Honor.

The Court: On what ground?

Mr. Strong: Because it specifically directs the jury, in effect, to acquit the defendant Paul J. Ziegler if he did not physically place the name "West Coast Supply Company" on the check. It also gives them a definition of "ration check" which includes, in effect, the instruction to acquit if Paul J. Ziegler did not physically place the name "West [515] Coast Supply Company" on a check.

The depositor portion is already covered elsewhere.

Mr. Carr: I contend, of course, that that is the law of the case right there.

The Court: I think that is more for argument. I shall allow an exception to Mr. Carr. I think that is more a matter of argument to the jury.

No. 27?

Mr. Strong: Objected to for the same reason, your Honor. It is another way of reaching the same result.

Mr. Carr: Your Honor, if you include instructions 26 and 27, in view of our position under the new rules, instructions that are now given are approved prior to the argument, that places the lawyer in this position: a lawyer should not argue law that is not the law in court.

I contend that that is the law, and I wish to argue it to the jury. The jury should receive instructions on that law. If you leave me without those instructions, I am in no position, theoretically at least, to argue that to the jury.

The Court: In the last sentence you say, in proposed instruction No. 27:

“Thus, if you find that the name West Coast Supply Company was placed upon the checks after delivery of said checks, then it was the duty of the broker or seller to return said checks to the issuer.” [516]

There is evidence here to show, from one of the brokers, that he was authorized to write in the name of the West Coast Supply Company. What does that do to that evidence?

Mr. Carr: Well, your Honor, his contention was that Ziegler might have indicated to him, but as to the authorization we claim that there was no such evidence.

I was merely following that alteration section to which I referred which makes it a duty. It may be that your Honor will want to re-word that latter line, but I feel that that is the law under the regulations.

Mr. Strong: May I call your Honor's attention to one thing? I have heard about this alteration section for sometime in this case, and I would like to call your Honor's attention to the fact that there are three types of alterations discussed. One is mutilation. The second is erasure. And the third is partial destruction.

It says nothing about addition as an alteration at all.

Mr. Carr: Well, now, I wouldn't be just too certain about my interpretation of that, Mr. Strong. Alteration has been defined since the beginning of law.

The Court: But, of course, if there is a specific definition, that would control over any general interpretation.

Mr. Carr: "No check which has been altered . . . mutilated or partially destroyed, or which contains an erasure . . ."

Now, what does "alter" mean? They didn't mean when they [517] said "No check which has been altered . . . mutilated . . ."

It doesn't mean mutilated.

". . . or partially destroyed, or which contains an erasure . . ."

There are four separate things there. Certainly alteration, in the common usage, means, for example, if I issue you a check and you change it from \$100,000 to \$150,000, it is an alteration. If you add anything to an instrument—

The Court: I think it is a matter of argument to the jury. Give Mr. Carr an exception.

No. 28?

Mr. Strong: I think that that is a good instruction.

The Court: No. 28 is a new kind of instruction to me, but I do not see any objection to giving it. I shall give it. It might have some bearing.

No. 29?

Mr. Carr: I sort of offer that instruction with a little bit of a blush, your Honor, because it is the theory of the Government's case but it is not my theory. But I just drafted it.

Mr. Strong: Well, I would say that I think it is a good instruction because of the fact that if there was sufficient credit in the bank account, those checks would not have been invalid. It should be changed to read:

“ . . . to acquit the defendant Paul J. Ziegler.” [518]

Is not that the same as in another instruction previously given here, your Honor, which sets forth the elements necessary before a conviction can be had?

The Court: It is a little more specific, and it is the law. In other words, if the jury find there were sufficient credits in that account—

Mr. Strong: We don't object.

The Court: All right. No. 30?

Mr. Strong: We object to 30, your Honor.

Mr. Carr: That certainly is well settled law, your Honor. The evidence, if you will recall, was that he came to me prior to the time that he received the sugar or prior to the time that West Coast received it and got legal advice on the matter. And from the advice he could not determine that it was an offense.

That Williamson case is a well settled case. That instruction has been given many times.

Mr. Strong: If your Honor please, if that were the law, then we would have no case because there is no dispute of the fact that the defendant spoke to Mr. Carr. If simply obtaining advice from an attorney removes all criminal liability for subsequent acts, there would never be any cases involving criminals, because they would all consult attorneys before.

Mr. Carr: It is a question of intent and willfulness, [519] and it goes to the jury for them to determine.

If a person went to a lawyer in good faith, your Honor, and said, "Here are the facts. I don't know what to do. I want to do this act, but I don't want to violate any law."

If the jury determines it is an honest proposition, it is a defense because it goes to willfulness.

Mr. Strong: This instruction makes that the only element.

The Court: Well, I think it is too broad; but I shall give an instruction if you gentlemen will give me a modified instruction. This goes a little too far.

I have a decision from the Supreme Court of the United States. I tried to find it while I was looking over these instructions. It is in my old instructions.

This is a little violent, but I am going to include an instruction along that line but not quite so drastic. So we will pass it.

Mr. Carr: I don't know, your Honor. Would your Honor indicate what part you—

The Court: Well, I tried to find that decision. Off-hand I would not like to do it without trying to find the decision.

Mr. Carr: It is the Williamson case, your Honor, the one I cited, in fact, on the instruction.

The Court: We will look up ours and yours.

Mr. Strong: I have no objection to No. 31, your Honor.

The Court: No. 31 is important, Mr. Carr? [520]

Mr. Carr: Very, your Honor.

I tried and defended the Ballard case and talked to one of the jurors, and he said he didn't like the looks of the defendant, and two other jurors said the same thing. They mentioned the personal appearance or the looks or attitude of the defendant. They didn't like Mrs. Ballard's blonde hair, for one thing. And I was surprised at grown people going into a jury room and proceeding on that theory.

Mr. Strong: There is another affirmative instruction which I believe your Honor gives, that the jury in determining credibility should take into account various considerations but I do not believe that this in any conflicts with that.

Mr. Carr: That is as to the witness on the stand, if he is evasive or anything of that kind. So it doesn't conflict with this.

The Court: Well, Mr. Carr wants it. I can understand in some cases where such an instruction would be important. But I did not think it applied in this case. However, I shall give it. That is defendant's proposed instruction No. 31.

Mr. Carr: No. 32, I think, covered the partnership, your Honor; and that, of course, now is not necessary.

The Court: Yes, "principal," is out.

Do you think that applies, Mr. Strong?

Mr. Strong: No, I don't think it applies. I agree with Mr. Carr. It should go out. [521]

The Court: All right, gentlemen. If you will let me have the balance of the instructions by 11:00 o'clock

Monday, I shall appreciate it very much so that I can work on them so we won't delay the trial in the afternoon.

All right, we will adjourn.

(Whereupon, at 5:40 o'clock p. m. an adjournment was taken until 1:30 o'clock p. m., Monday, February 10th, 1947.) [522]

Los Angeles, California, Monday, February 10, 1947
1:30 P. M.

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulate.

Mr. Carr: So stipulate.

The Court: Stipulate the defendant is in court?

Mr. Carr: So stipulated.

Mr. Strong: So stipulated.

The Clerk: There is another matter, your Honor.

(Brief interruption for other court matters.)

The Court: Ladies and gentlemen of the jury, I have some matters to take up with counsel. So you will please retire to your jury rooms, and I shall call you.

Again I give you the same suggestions. I know you will not discuss the matter among yourselves or permit anyone to discuss it in your presence. Do not express or form any opinion as to the merits of the controversy until it is finally submitted to you under the instructions of the court.

(Jury excused at 1:35 o'clock p. m.)

The Court: Now, let me get the Government straight here first.

The Government has withdrawn its instruction No. 4 found on page 4 and has asked to have substituted instruction No. 4, new instruction No. 4.

Mr. Carr: Of course, that is— [524]

The Court: I am just trying to straighten them out.

Mr. Carr: I see. I am sorry.

The Court: And the Government has prepared an instruction No. 8 to be substituted for the former instruction No. 8 that was submitted to the court.

The Government has withdrawn its formerly submitted instruction No. 11 and asked to have submitted a newly prepared instruction No. 11.

The Government has withdrawn the original submitted instruction No. 12 and asked to have submitted a new instruction No. 12.

The Government has requested an additional instruction, which is numbered 6-B.

The Government has requested an additional instruction numbered 6-C.

Mr. Strong, have I noted all of your substitutions and new suggested instructions?

Mr. Strong: Yes, your Honor.

The Court: Now we will go to the defendant's.

The defendant has proposed a rewritten instruction No. 33. Is that the same number as the other? I think not.

Mr. Carr: No, your Honor. That is in addition.

The Court: In addition to the other one?

Mr. Carr: Yes.

The Court: As to advice of counsel? [525]

Mr. Carr: Yes.

The Court: What was the number of the other one?

Mr. Carr: That was No. 30, I believe, your Honor. Yes, No. 30.

The Court: Yes. The defendant has prepared instruction No. 33 which it requests to be given in connection with the instruction heretofore discussed, instruction No. 30.

The defendant prepared a new instruction No. 35.

Mr. Carr: No. 34, your Honor.

The Court: 34? I have "35" here. Do you have another one? Maybe it is not in order. I have 35, 36, 37, 38, 39 and 40. I do not have 34.

Mr. Carr: Counsel, did I give you a copy of 34?

Mr. Strong: Yes, I have a copy of 34.

Mr. Carr: If I may, your Honor, I shall pass it up.

The Court: Do not pass it up until I go through some other papers here.

(Brief pause in the proceedings.)

The Court: Now, Mr. Carr?

Mr. Carr: May I pass it to the clerk, your Honor?

(Document handed to the court.)

The Court: Defendant proposes a new instruction No. 34. The defendant proposes a new instruction No. 35. The defendant proposes a new instruction No. 37.

Mr. Carr: 36, your Honor. [526]

The Court: "37" I have, Mr. Carr.

Is there a No. 36 that I do not have, too?

Mr. Carr: Yes, your Honor.

The Court: Wait and let me see.

(Brief pause in the proceedings.)

The Court: No, Mr. Carr, that has been omitted, too.

Mr. Carr: You do not have it, your Honor?

The Court: No.

Mr. Carr: Mr. Strong?

Mr. Strong: I have a copy here.

Mr. Carr: I will pass it to the clerk.

(Document then handed to the court.)

The Court: The defendant has new proposed instruction No. 36. The defendant has a new instruction No. 37 which it requests the court to give.

Mr. Carr: May I interrupt, your Honor?

The Court: Yes.

Mr. Carr: To say that 37 is practically the same instruction as the one numbered 19, a rewritten instruction of 19, your Honor.

The Court: Shall we withdraw 18 and substitute 37?

Mr. Carr: 19 you mean, your Honor? 19? I think it is probably more expressive of the factual situation.

The Court: Yes.

Mr. Carr: Oh, that is perfectly all right. [527]

The Court: Withdraw 19?

Mr. Carr: And substitute 37.

The Court: And substitute 37.

Mr. Strong: I understand your Honor has not ruled on them?

The Court: No. No, I am trying to get them in place so we can discuss them.

The defendant requests new instruction No. 38. You had something on that, did you not?

Mr. Carr: Well, that is proposed in addition, your Honor, because there was some question.

The Court: With what does it go?

Mr. Carr: That other one, that is, instruction 22.

The Court: The defense requests instruction No. 38 to be given in connection with 22, is that right?

Mr. Carr: Well, it is more or less drawn in two different ways, your Honor. There was some question the other day about the form of No. 22; so I drafted 38 and 39 and tried to make an instruction that possibly would be—

The Court: On the same subject?

Mr. Carr: Yes.

The Court: And the defendant requests instruction No. 40. I do not find a definition suggested by either of the word "alteration."

Therefore, I am taking the definition out of Bouvier's [528] Law Dictionary, Rawles's Third Edition, Vol. 1, page 183.

"I charge you that 'alteration' means a change in the terms of a written instrument by a party entitled thereunder without the consent of the other party by which its meaning or language is changed."

Mr. Strong: That is satisfactory to the Government, except that we do not think that alteration has any part in it.

The Court: But the defense has raised it. The jury would have no knowledge of what an alteration is, and there is no definition in the statute.

Mr. Carr: That is satisfactory to us.

The Court: It seems to be clear. In other words, if an instrument is delivered and if the parties agree to a change, it is not an alteration. But, on the other hand, if they do not, it is an alteration under the law.

Mr. Carr: The only trouble with that, if I may respectfully disagree with that—

The Court: Yes.

Mr. Carr: —is that Ration Order 15.7 provides that if it is altered after it is passed, it cannot be passed. I mean, after it is delivered it cannot be passed.

The Court: Then it could not be sent back and be corrected.

Mr. Carr: I think that giving a dictionary definition [529] is quite proper, but I am just wondering if you leave that short of reading the section from the ration order if you are not leaving the jury under the impression different from what the order requires. In other words, it says:

“A person who holds such a check shall return it to the issuer with request for a new check. . . .”

Mr. Strong: No such person is charged in this information with having committed a violation of that order, your Honor. That would be somebody who had it and then passed it on.

The Court: The defendant is entitled to an instruction on it. If there is any objection to it, I shall withdraw it and let the jury just speculate on it.

Mr. Strong: There is no objection to the definition given by your Honor.

Mr. Carr: I shall ask the court to merely add that to the definition and read that portion of Section 15.7 of the 3rd Revised Ration Order applicable to alterations.

Mr. Strong: Well, may I submit, your Honor, that if that is going to be the case, I should like to request that my entire instruction No. 5 should be as originally given because if we are going to go into the question of alteration, I think we ought to bring out these other prohibitions which deal with the acquisition of sugar without a properly issued document, and various other contentions. [530]

The Court: I shall look at it. I suppose it ought to be given together.

Mr. Strong: Also the original of our instruction No. 6, your Honor, should be given in toto.

The Court: One of the sections that we agreed to strike out of Government's instruction No. 6 was:

"Since April 27, 1942, no person has been permitted to deliver sugar to any consumer and no consumer permitted to accept delivery of sugar from any person except upon giving up evidence covering the amount of sugar delivered."

It is the theory of the Government that the proper ration check for sugar was given, and the defendant's position is that the proper check for rationing sugar was not given. Is that not right?

Mr. Strong: In effect, that is.

Mr. Carr: The check, in effect, was given under the ration order, yes, your Honor.

The Court: What is the defense's position, Mr. Carr, so I will get that clear?

Mr. Carr: With respect to—

The Court: Receiving sugar. Defendant says that the John H. Ziegler Company received the sugar but did not deliver a proper sugar check.

Mr. Carr: Well, our position is simply this, your Honor: [531] that the check was altered after it was passed or delivered and that under the ration order the person holding it is required to return it. And this defendant cannot be guilty of an offense when that person transmits it on in violation of the order.

The Court: No. As he says in his testimony, he did not give a proper ration check; and still he received the

sugar. He said, "That is not a proper check because it is merely signed by himself and I had no sugar account."

Mr. Carr: Well, that is the trouble, your Honor. That is not the charge in the second count.

The Court: No. The count is that he delivered a proper check and it was overdrawn.

Mr. Carr: May I just refer to that, your Honor?

The Court: Yes.

Mr. Carr: The second count charges that it is a violation of Section 2.9 of the general ration order No. 8, which reads:

"No person shall receive. . . ."

Now, I don't have that No. 8 here.

At any rate, it alleges that they willfully received a rationed commodity from the Union Sugar Company in exchange for a ration document, to-wit, a sugar ration check.

In other words, our position is that this was not a sugar ration check.

The Court: That is it. [532]

Mr. Carr: Then it says:

". . . drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler. . . ."

The Court: That is right.

Mr. Carr: Of course, our contention is there that it was not a ration check at all.

The Court: That is right.

Mr. Carr: Then it goes on to say:

". . . when said defendants knew and had reason to believe that said ration document was not validly issued because the said West Coast Supply Company did

not have a sugar ration bank account . . . with a balance . . . sufficient to cover. . .”

The Court: That is right.

Mr. Carr: Now, our contention is that now the case has developed that there was no ration check account because Ziegler was not a depositor.

The Court: So he received sugar without giving a ration check?

Mr. Carr: No, that is not the offense charged. There is a section that they could have charged him on as to that, your Honor.

The Court: It says here “there was no check given.”

The defendant says he did not have a proper ration check; he just wrote a check with his name. There is evidence both [533] ways, of course, that is, evidence from one of the brokers that he authorized his name to be placed on the check.

Mr. Carr: You see, if the court please, we are being juggled between two offenses. In other words, we are charged specifically here, if you will look at the information—

The Court: Then it seems to fit together because if the defendant had been charged with having not given a ration check, then the defense’s point would be, I suppose, “Why, I did give it and told them to fill it in. I just omitted to put the name ‘West Coast Supply Company’ on there.”

Then it would complete the act under the first charge, would it not, Mr. Carr?

Mr. Carr: My contention is, your Honor, it was not a ration document. There was no balance; there was no deposit.

The Court: It was not a ration document if he did not authorize, as one of the brokers says, the name "West Coast Supply Company" to be written there.

Mr. Carr: Well, I see what your Honor has in mind.

The trick of it is this, of course: putting the West Coast name on there, it seems to me, could not create the offense. The Government has to allege and prove that it was actually drawn on that account.

Now, I assume, your Honor, that there might be a civil authority—I see what your Honor is driving at. But that is not our theory. Our theory is that the Government has to go [534] to the proof as against Ziegler that he had a ration account, and this check was on that account and there was an overdraft and he received sugar knowing that it was an invalid ration document in that respect.

The Court: They claim it was valid but the account was overdrawn.

Mr. Carr: That's right. That is exactly right. But that is exactly why we say the case cannot go to the jury on that theory because it is not in line with the allegations of the information.

In other words, your Honor, if I may take one second, here is where the confusion is:

They started out in their information, and in Count Two they put two sections showing their doubt about the matter. They first put Ration Order No. 8, 2.8 and 2.9.

Well, they marked out 2.8. 2.8 is more or less the theory your Honor is discussing now. So what they have done is they have focused their complaint under 2.9. This is not just a simple charge, your Honor, of receiving sugar.

The Court: The whole theory of the Government is very clear to me.

Mr. Carr: It is an overdraft, that's right. And I submit—

The Court: And the defendant here drew, as he says, a ration check that was void to secure sugar on a void check. [535] And he says, "I had no account." I believe his testimony is that it was up to the broker whether or not he wanted to accept it, that that check was valueless.

Is that not it, Mr. Carr? Then the broker says, one of them at least, that "It is not complete"; and Mr. Ziegler said, "Well, fill it in with the name of the West Coast Supply Company."

Now Mr. Ziegler denies that. He says he did not give any authority to fill in the name of the West Coast Supply Company.

That is an issue for the jury because I take it that if Mr. Ziegler took the check back or if he went up there and said to his secretary, "Just write the name 'West Coast Supply Company' in there," I suppose that would be sufficient.

Mr. Carr: Well, the point—I don't want to impose on your Honor.

The Court: All right.

Mr. Carr: But the point is this: we are caught in a jockey between two alleged offenses here now, and we are going to the jury with just the simple proposition that if he gave some kind of a piece of paper and it was not a ration document and he got sugar, he is guilty.

That is not the offense charged here, and that is the thing I want to avoid. I am afraid that that is the impression that the jury is going to get unless we are very

specific [536] about that because it is very confusing even to me.

The Court: Oh, no. The evidence is very clear that Mr. Ziegler attempted to get sugar by an invalid rationing order, and he so stated.

Mr. Carr: That is 2.8, your Honor.

The Court: He signed that check knowing that he had no account, no sugar account, and that the West Coast Supply Company did not authorize the bank to honor that and because he did not write, did not authorize the writing of "West Coast Supply Company" on that check.

Had he done that, well, then, of course it would be a clear question of whether or not there was an overdraft.

Mr. Strong: May I submit, your Honor, in connection with this, your Honor and counsel also look at Government's proposed instruction 6 and 6-C which are intended to be applied to this proposition?

Mr. Carr: Well, if you give them 2.8, I simply can't see—

The Court: Wait until I get the one called to my attention. I have 6-B. Is that the one to which you are calling my attention?

Mr. Strong: 6-B and 6-C, both.

The Court: Yes.

Mr. Carr: Oh!

Mr. Strong: May I say to your Honor— [537]

The Court: Yes.

Mr. Strong: —the reason I am giving 6-B is that the defendant has added 34. 34, in my opinion, does not state the law. Consequently, I have reframed it to include 6-B and 6-C. But it all goes to the same basic

proposition of this issuance of checks which the defendant says are not valid checks because somebody else does something.

We are going to bring in here the problem of whether somebody else's act is a proper one or not. Then I think the entire field of whose acts are proper and what kind of acts are improper should be gone into so that the jury is not left with the impression that the wrongful act by the issuance of a piece of paper can become rightful because of something done by the receiver of that piece of paper.

If the question of alteration, the jury might become very confused; simply because the broker did something wrong and that that completely whitewashes the defendant, that, of course, is not the law.

Mr. Carr: That is not our theory either.

The Court: Well, gentlemen, let us then take up in order the defendant's new instructions.

Mr. Carr: Are we taking the Government's or the defendant's first, your Honor?

The Court: We will take the defendant's because we may be able then to modify the two if we find they are in conflict. [538]

Mr. Carr: Very well, sir.

The Court: Which is your first one, Mr. Carr, that you propose to change?

Mr. Carr: Incidentally, your Honor, before you start on that one I should like to call your attention to instruction No. 17. The court did not rule on that, one way or the other.

The Court: 17?

Mr. Carr: 17, your Honor.

The Court: All right, wait until I find it.

Yes. Now I have 17 in front of me, Mr. Carr.

Mr. Carr: You will remember, your Honor, I wanted to cut out at the end of that instruction “. . . or that he was authorized by the defendant West Coast Supply Company to issue . . .” because I felt that that probably created a confusion in the matter of agency. Your Honor said something, I believe, about not being satisfied with the instruction.

I think that is covered. I might withdraw it to save your time, your Honor.

The Court: All right.

Mr. Carr: It was probably covered.

The Court: Was there any other one, Mr. Carr, that you were holding up?

Mr. Strong: 19.

Mr. Carr: I have a list here showing exactly what the situation was, your Honor. [539]

Here is the situation, as I recall it, your Honor—

The Court: No. 37, Mr. Strong, has been substituted for 19.

Mr. Strong: No. 37 is the defendant's substitution for 19.

The Court: That is right.

Mr. Strong: Government's instruction No. 4 is a substitute for both 19 and 37.

The Court: Government's old instruction No. 4?

Mr. Strong: Just Government's No. 4, the new No. 4.

The Court: Let us see. Yes, I read both of those.

That is my interpretation of the law; and, of course, Mr. Carr takes exception to that statement of the law proposed in Government's instruction No. 4.

Mr. Carr: No. 4, your Honor? Well, of course, that is, as your Honor points out, just exactly contrary to our position on that.

The Court: I think that is the law, Mr. Carr. My investigation of it shows that. That is a very important matter on it for you, and I think you ought to make the record clear on it, addressing yourself now to No. 4.

Mr. Carr: Yes. Addressing myself to Government's requested instruction No. 4, we raise our objection that on the constitutional issue that we have heretofore raised that the emergency no longer existed and the power did not actually exist at that time. I believe that covers it. [540]

The Court: Yes, with your other objections on that matter.

Mr. Carr: Yes.

The Court: All right, let the record so show. Government's instruction No. 4 will be given.

Mr. Carr: Except that I don't like the phrase "no effect." It seems to me there is a better phrase. That "no effect" carries a connotation and implication that the OPA just stayed as it was when, in fact, it did not.

One of the questions in this case, your Honor, is his good intent by reason of the OPA act dying.

Mr. Strong: As to that, may I state, your Honor, as I think I pointed out at the beginning of this trial, our position is that there are two separate things here. One is the law, which continued sugar ration, and the other is a question of the agency to enforce it.

The Court: Yes. I have heard that long enough, gentlemen, in this and other cases before me.

Let the record show the proposed change is refused. Now, which is the other one?

Mr. Strong: No. 19 was the other one.

The Court: The other one was No. 19, and I refused No. 37.

Mr. Carr: You have not refused 37, have you, your Honor?

The Court: Yes.

Mr. Carr: That is nothing more than a straight factual [541] statement of the—

The Court: Absolutely contradictory to No. 4.

Mr. Carr: No, it is not, your Honor, not contradictory at all, if I may respectfully suggest.

The Court: All right.

Mr. Carr: I hope your Honor does not understand me to dispute you. I am just disagreeing.

The Court: Go ahead.

Mr. Carr: But this new one No. 37 says that the President vetoed the bill extending the Office of Price Administration act.

This goes to the question of intent, your Honor, this instruction. In other words, the defendant claims here and his theory is that he believed that when this act died that the whole OPA died with it.

All I want the jury to know is that it is a fact that the OPA did die at that time under the price control provisions of that Act.

The Court: But it did not effect sugar.

Mr. Carr: That may well be. The other instruction is not inconsistent with it. But I do want them to have that instruction.

Then it goes on to say that the President promulgated and signed Executive Order No. 9745—I put that in—which provides that the Office of Price Administration

was directed [542] to continue to exercise all powers and functions. I put that in purposely because that is the Government's theory.

“ . . . (it) did not terminate by reason of the termination of the Emergency Price Control Act and such powers that were delegated to the OPA pursuant to the Second War Powers Act.”

In other words, that is a better instruction, your Honor, than No. 4. It tells the jury that the President did this but the powers remain. Then it merely sets up that the Executive Order was signed and was filed in the Federal Register.

I submit that that goes to the very heart of our case on the question of intent.

Mr. Strong: Your Honor, I think that No. 4 says in fewer words the same thing, and the jury will be less confused with No. 4 than No. 37.

Mr. Carr: Well, they will be less confused in favor of the Government, I will quite agree.

Mr. Strong: They will be less confused as to the actual state of the law, your Honor. Also No. 37 assumes certain things, one of which is that the order was not filed until July 2, 1946, was not published until that date.

I don't know when it was published. There may be a date on the document, but I don't know what difference it makes in this date. That 10:32 a. m., for example, is Washington, D. C., time; and I think Mr. Carr will agree that that is [543] 7:32 a. m., Los Angeles time. So that is misleading to begin with.

Mr. Carr: If you want to put in the different times, all right.

The Court: Well, you see the second paragraph of instruction No. 4:

"I further instruct you that on June 30, 1946, the President of the United States issued an Executive Order by which he continued in effect the Office of Price Administration as the enforcement agent for that purpose"

Mr. Carr: I submit, if the court please, the defendant's requested instruction No. 37 goes right to the heart of the matter. We are not saying in that instruction that there was no OPA. We are confessing it. But we are setting up the factual legalistics so the jury may determine the intent in the case.

Mr. Strong: That is a matter, I submit, your Honor, for argument to the jury; and on the basis of Government's instruction No. 4, which covers it, Mr. Carr can argue it. I think that No. 37 is confusing. It is too legalistic in its terminology, and the jury should not be instructed in terms of statute to the point where they do not understand exactly what is happening; whereas, Government's instruction No. 4 states what the law was as of that date and states in terms [544] understandable to the jury and commensurate with the law.

Mr. Carr: I should like the record to show that I am very vehemently insisting on this instruction. I think it goes to the very heart of the case.

The Court: I want the record to so show to protect your rights, Mr. Carr.

Mr. Carr: You are refusing that one, your Honor?

The Court: Yes, and exception is allowed to the defendant.

Mr. Carr: I should just like to further point out, just to call your Honor's attention to the fact, that respecting the executive order it is already in evidence in this case; so that instruction is merely telling the jury about the violation of that.

The Court: That is one of the reasons I am not giving it because I do not believe it is proper to put in an instruction all of the evidence.

What is the next one?

Mr. Strong: The next one that was passed is defendant's instruction No. 22 and the Government's newly requested instruction No. 8 which is intended to cover that situation.

Mr. Carr: Instruction what? 22?

Mr. Strong: Your instruction No. 22.

The Court: I have on defendant's instruction No. 22 marked "hold" from our other conference. [545]

Mr. Strong: Yes.

The Court: Now, which do you want it compared to, Mr. Strong?

Mr. Strong: New instruction No. 8, the one that I sent in this morning.

May I say in that connection that I have added lines 17 down to 24 only because of the discussion yesterday. It is still my feeling today that they do not have any place in this instruction. However, since your Honor indicated that he thought possibly a re-draft, more in conformity with the terms of the statute might be preferable, I have inserted those lines. However, my basic desire is to have the instruction as it stands up to line 16 and not including the balance. If your Honor feels something should be said about presumption, then only it is desired that the rest be inserted.

Mr. Carr: May I be heard from at this point?

The Court: Yes.

Mr. Carr: I submit that instruction No. 8 is erroneous. It is right in the teeth of the Flannagan case, which is a Ninth Circuit case, 145 Fed. (2d) 740.

Mr. Strong may have some opinions about the interpretation of the Act, but the Ninth Circuit has said in very plain language that it is such a presumption that is rebuttable.

I am taking my instruction on the whole theory from the Flannagan case. If the Ninth Circuit is wrong, Mr. Strong is right. [546]

Mr. Strong: I submit that the Ninth Circuit is right, your Honor. The only difference is that the Ninth Circuit has not said in the Flannagan case what Mr. Carr says it said. It does speak of a rebuttable presumption, but it does not say that knowledge is the presumption which is rebuttable.

I submit to your Honor that the statute on its face provides what presumption is rebuttable. It delineates it in four separate sections: A, B, C and D.

I further submit this to your Honor: that the Ninth Circuit could not have meant what Mr. Carr says, for this reason: that if there is a rebuttable presumption as to knowledge, which takes the place of constructive notice, which is permitted under the Federal Register Act, then the Federal Register Act is a piece of valueless legislation.

Obviously the Federal Register statute, which permits constructive notice by way of publication, was intended to take the place of any kind of knowledge, presumptive or otherwise; and if that constructive notice can be rebutted by merely showing that an individual did not, in fact,

know about the law, then there is no constructive notice permitted by the law and the statute is invalid.

Mr. Carr: I suggest we get the case and read it again, your Honor.

To me it is just as plain as the hand in front of you.

Mr. Strong: May I read to your Honor from another [547] decision that I have found since?

This is the case of *Henderson v. Baldwin*. It is found in 54 Fed. Supp. at page 438. It is a 1942 decision. On page 439 the paragraph numbered (1) reads as follows:

"The only defense offered is that defendants had no precise knowledge as to the rent regulations prior to the institution of this suit, and that as soon as they acquired this knowledge, they have complied with these regulations, and have refunded all rentals collected by them in excess of the rate of March 1, 1942. This certainly is not a good defense. It was their duty to know what the rent regulations were, and to comply with them."

Then the court goes on to say:

"The designation of Erie County, Pennsylvania, as a defense-rental area was filed with the Division of the Federal Register on April 28, 1942, and was published in the Federal Register on April 28, 1942. . . . Maximum Rent Regulation 28 covering the Erie County defense area was issued and filed June 30, 1942, and was published in the Federal Register on July 1, 1942. . . . Section 307 of the Federal Register Act, 44 U. S. C. A. 301-314, provides that filing of a document with the Division of the Federal Register gives constructive notice of the contents of the document to all persons [548] affected thereby."

I think that that is a correct expression, your Honor, of what Section 307 does; and I think also that the Flanagan case is not contrary to this.

Mr. Carr: I submit, in final, on that, your Honor, that this whole case turns, so far as willfulness is concerned, on the question of intent.

Counsel is intending that you should instruct this jury as to whether defendant knew about that order or not on July 1st. That is wholly immaterial. He is supposed to know it; and that, I submit, is not the law.

Mr. Strong: I submit, your Honor, that the Government is perfectly willing to have this point taken up on appeal by Mr. Carr.

The Court: Well, I try to avoid appeals.

Mr. Carr: Yes, at our expense, I am sure.

The Court: I try to avoid appeals if I can get the law correct.

In instruction No. 8 the last part which states "that it creates a rebuttable presumption," from there on has not the defense a wide-open door to show by the testimony here, from their theory, that the presumption has been rebutted?

Why should I go to the evidence?

Mr. Carr: Well, your Honor, you are stopping too short. You are telling the jury there is rebuttable presumption, but [549] you are not telling them in what way.

The Court: Am I going to put the evidence in here?

Mr. Carr: If you let me tell them what the law is, why, I certainly will. But I am not supposed to do that.

The Court: No, I will stop you.

Mr. Carr: I am not supposed to do that.

The Court: I will stop you and I will stop any lawyer who attempts to state the law. But you can say that "if the court instructs you so and so, then this follows." That is proper.

Mr. Carr: I know. But the rules have changed, your Honor. That used to be the case. Now we are arguing after your Honor has agreed on the instructions; you tell us what the law is.

The Court: That is right.

Mr. Carr: It is changed now. We used to be able to get up and speculate.

The Court: Oh, yes.

Mr. Carr: We don't do that now.

The Court: Oh, yes, you cannot state the law; but you can tell the jury, "if the court instructs you so and so . . ."

Mr. Carr: I want the court to instruct the jury as they say in the Flannagan case—

The Court: I am saying it in the same instruction, and you are arguing to the jury that "we have rebutted that as shown by the testimony here that this defendant has rebutted [550] that presumption." Then you make your argument.

Mr. Carr: This instruction No. 8 is a very broadly drawn instruction. It leaves me with a very distinct impression, from the first few sentences that the law does not require that the defendant have actual knowledge of the provisions of the Second War Powers Act, and then it jumps down and says "all persons, including those who use or deal in sugar, are charged by law with notice of the statute."

Then it jumps down and says, "but the document creates a rebuttable presumption."

Of what?

The Court: Rebuttable presumption with reference to that particular statute.

Mr. Carr: Well, it creates, as I understand this Flannagan case, this rebuttable presumption, and that is that he did not have any actual intent because he had no knowledge of the particular filing.

The Court: He said that on the stand.

Mr. Carr: That's right. That is the reason I want this instruction. I think that one is an erroneous instruction, your Honor.

The Court: No, I think the instruction is correct. But I am not going to give the last sentence, Mr. Strong, in this instruction which I think is improper:

"I now instruct you that there is no evidence in this [551] case to rebut that presumption, and that, consequently, the presumption is controlling in this case."

Mr. Strong: I submit, your Honor, that that is the case.

The Court: No.

Mr. Strong: May I read to your Honor what rebuttable presumption is, which is the only one permitted in this case?

In 44 U. S. C. A., Section 307, after detailing that publication in the Federal Register shall "be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby," it goes on to say:

"The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated . . ."

There is no evidence in this case rebutting the presumption that it was duly issued, prescribed or promulgated.

“ . . . (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation”

There is no evidence in this case to the contrary.

“ . . . (c) that the copy contained in the Federal Register is a true copy of the original”

There is no evidence rebutting that in this case.

“ . . . and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with” [552]

There is no contrary evidence in this case, your Honor. That is why I put in the last sentence. But if your Honor would rather give it without that, I will agree to take it out.

The Court: That is too strong an instruction. I am not going to pass on those questions.

Mr. Strong: All right.

The Court: Let the record show that I am striking out the last sentence in Government's proposed instruction No. 8:

“I now instruct you that there is no evidence in this case to rebut that presumption, and that, consequently, the presumption is controlling in this case.”

Let the record show exception to Mr. Carr as to instruction No. 22.

Where is the next one, gentlemen?

Mr. Strong: I think the next one is No. 30, your Honor, defendant's instruction No. 30, if I am not mistaken. That was passed.

The Court: I have passed No. 30.

Mr. Strong: We object to that, your Honor.

The Court: Mr. Carr has submitted a new instruction on that.

Mr. Strong: That is No. 33, the one he submitted as a substitute.

Mr. Carr: I did not offer that as a substitute. I offered it in addition thereto. [553]

The Court: No, it was an addition.

Mr. Strong: I apologize. I thought it was a substitute.

The Court: No, it is an addition.

Mr. Strong: I object to No. 33, your Honor, for this reason—may I state my reason?

The Court: Yes.

Mr. Strong: I think that in a case where willfulness is an element, if a person goes to an attorney prior to committing the act and consults with him, that that is one of the factors to be considered by the jury in determining the presence of willfulness. But I submit, your Honor, that I have tried to recall the evidence in this case. I do not recall any evidence of Mr. Ziegler's consulting any attorney prior to July 1, 1946.

I might be wrong, but I recall none. And if that is true, then there is no use of this element entering into his willfulness and this act of issuing the checks prior to July 1, 1946.

Mr. Carr: I submit that some sugar was received, and counsel is certainly standing on the proposition that whoever received the sugar was in violation of Counts Two, Four, Six and Eight.

The evidence shows that he did consult a lawyer about that time while he was allegedly receiving the sugar.

Mr. Strong: Well, possibly the instruction, then, should [554] be reworded so as to cover all those counts

in which he committed acts subsequent to seeing an attorney and not including the count in which he is charged with committing acts which he committed prior to seeing an attorney.

The Court: Well, Mr. Carr is a very careful lawyer and he quotes the Supreme Court of the United States to justify his instruction, but he leaves out the sentence that is against him.

The Supreme Court quoted this sentence from the instruction that was approved:

“But, on the other hand, no man can willfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.”

Mr. Carr just took part of the instruction. If you will turn to page 454—

Mr. Carr: I know, your Honor. But I don't propose to submit the Government's side of the case. I put in my instruction:

“Generally speaking, advice of counsel is not an excuse for a violation of law”

And that is a proper statement, I believe.

The Court: You do not agree with the Supreme Court's statement?

Mr. Carr: Well, I submit when you pick up an instruction from the court, you don't necessarily copy it verbatim. You [555] take it and interpolate it in the light you, as a lawyer, agree—

The Court: I agree with you. As a lawyer, I would take the part that was favorable to my client and I would omit the other. But the court is in a position where he is

just trying to get the instruction in accordance with the Supreme Court's position here, gentlemen.

Mr. Carr: Well, I will say this much: it certainly is the law of the land, your Honor.

The Court: Yes, exactly. I feel, gentlemen, I should follow this instruction. Mr. Reporter, will you take this? I am reading from *Williamson v. United States*, 207 U. S. 453.

"I instruct you that if the defendant Paul J. Ziegler honestly and in good faith sought the advice of a lawyer as to what he might lawfully do in the matter involved in this action and fully and honestly laid all of the facts before his counsel and in good faith and honestly followed that advice, relying upon it, and believing it to be correct and only intend that his acts should be lawful, he could not be found guilty of this offense which involves willful and unlawful intent, even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that [556] he followed the advice of counsel."

Mr. Carr: I won't object to that instruction, your Honor.

The Court: No, I have taken it right out of there, Mr. Carr. All right. And I am withdrawing—

Mr. Strong: May I have that limited to Counts Two, Four, Six and Eight, since there is no evidence here that he consulted an attorney prior to committing the acts alleged in Counts One, Three, Five and Seven?

The Court: That is a matter of argument to the jury. That is a matter of evidence, Mr. Strong. I am not going to put evidence in here if I can avoid it.

Defendant's instructions Nos. 30 and 33 are out.

What is the next one, gentlemen, for defendant?

Mr. Strong: Defendant's No. 34, I believe.

The Court: Yes, I have it.

Mr. Strong: The Government offers 6-B and 6-C as a substitute for defendant's instruction No. 34.

May I state to your Honor that defendant's instruction 34 I have accepted up to line 10 of the instruction, and at that point I have omitted the balance and have inserted an additional definition of "person."

That is in Government's instruction 6-B substitute. And I have added 6-C.

The Court: Mr. Carr?

Mr. Carr: Yes, your Honor. I submit that defendant's [557] instruction No. 34 is the law in that it provides the definition of "issue" in exact quotation from Revised Ration Order No. 3.

It defines the word "delivery," and then it merely says that you must find "beyond a reasonable doubt that said checks were completed when they were delivered to the person to whose account they were made payable."

That is the exact law of the ration order.

The Court: If that is the law, of course I should instruct the jury to return a verdict of not guilty. That is why I could not give the instruction.

Mr. Carr: Well, your Honor, of course I think when counsel sticks in again the word "person" in his No. 6-B, I don't see what the point is. He thinks the partnership is apparently still in this action. It is out of it. And when you come to 6-C, that instruction does not have a thing to do with this case. It is erroneous, for one thing. It says:

"You are instructed that it is not necessary for you to find the defendant did every act necessary to make out the offense . . ."

Now, if that instruction is given to the jury, I submit that is erroneous on its face.

The second part of it having to do with acting through a confederate or aiding and abetting, I don't think it has applicability to this case at all.

Mr. Strong: Your Honor, do you care to hear from me? [558]

The Court: Just a minute. Defendant's instruction No. 34 is denied and exception allowed to the defendant.

Government's 6-B will be given.

Mr. Carr: Well, I submit, your Honor, that word "person" defined again there is certainly confusing.

The Court: You see, the only reason I am leaving that in, Mr. Carr, is that the account that is involved here—and I have limited all of the evidence to Mr. Paul J. Ziegler—there is in evidence these documents and instruments with reference to the fictitious name "West Coast Supply Company." So I think the jury should have that.

The first sentence of 6-C will be stricken out. I think that is too broad a statement. And I am going to strike out the word in line 10 "confederate." That carries a bad connotation to the jury. And I am going to strike out the word "confederate" in line 11 and the word "confederate" is stricken out in line 14. As so amended, the instruction will be given and exception will be allowed to the defendant on 6-C.

What is the next one, gentlemen? It is pretty late here.

Mr. Carr: May the record just show that insofar as that instruction I don't thing I stated, your Honor, that there is no question involved in this case of aiding and abetting or involving a principal at all insofar as the statute sets forth.

We object to it because it may confuse the jury.

The Court: Let the record so show. [559]

What is the next one, gentlemen?

Mr. Strong: Which? The defendant's, your Honor, or the Government's?

The Court: I want the defendant's.

Mr. Strong: No. 35.

The Court: All right.

Mr. Strong: We object to 35.

The Court: On what ground?

Mr. Strong: It does not state the law because it provides, in effect, that if the checks were issued as they were issued in this case, according to the defendant, there is no violation. In effect it states that if the defendant simply issued them with his name on them and that is all, he is to be found not guilty. Also I do not understand the necessity of any instruction relating to what some third person has to do if he receives a check which was not issued in accordance with the law. No third person is being tried here. It is the defendant and his acts with which we are concerned, not somebody else.

The Court: I have the same objection to that, gentlemen, that I had to the other. That really is an instruction of not guilty.

What is the next one?

Mr. Strong: No. 36, your Honor.

Mr. Carr: That is refused, is it, your Honor?

The Court: Refused and exception allowed the defendant. [560]

Mr. Carr: No. 36.

The Court: No. 36, yes.

Mr. Strong: We object to 36, your Honor.

The Court: On what ground?

Mr. Strong: Beg pardon?

The Court: What ground?

Mr. Strong: On the ground that it again requires that the defendant have done every one of the acts which he says he is required to do under his technical interpretation of the statute. It demands that he be found to be a depositor specifically, although a depositor is defined meaning a person who has a ration check bank account, and a person is defined as an individual, partnership, et cetera, or any agency thereof. Certainly the defendant was an agent of the person, the depositor in this case.

Mr. Carr: It seems to me that Mr. Strong's theory of this case is that the defendant is being tried on some moral charge. I thought we were being charged with violating 15.7 (d) of Ration Order No. 3 Revised.

If that is the case under the order you must be a depositor before you can have an overdraft. It seems to me that that is just plain common sense. If I draw a check where I do not have an account, you cannot charge me with not having an account.

The Court: An overdraft. The instruction would mean an [561] acquittal:

"Unless you find beyond a reasonable doubt that he was a depositor and that the checks were drawn against his account, you must acquit on those counts."

Exception allowed the defendant.

Mr. Strong: Defendant's No. 38 is next, your Honor.

The Court: All right.

Mr. Strong: I submit that that is the same as the instruction which we discussed previously, your Honor, relating to the Federal Register, The Government instruction covered that.

The Court: Was No. 38 put in some other place, Mr. Carr?

Mr. Carr: 38 was a re-draft. I am adding it as an additional instruction. It says, "See instruction 22," your Honor. It covers the same feature; but I had anticipated at that time the other day that your Honor was concerned about some phase of it. So I drafted a couple of more interpretations and added to the instructions.

The Court: To what number, Mr. Carr?

Mr. Carr: 22. A strange thing, I have that marked "Given," your Honor. I must be in error about that.

Mr. Strong: Your Honor gave Government's instruction No. 8.

The Court: Wait a moment. I want to get Mr. Carr here.

Mr. Strong: Yes, your Honor. I am sorry. [562]

The Court: No. 22: I have that marked "not given."

Mr. Carr: Well, I had better change mine, then.

The Court: Let the record show that an exception is allowed to the defendant.

What is the next one?

Mr. Carr: No. 38 is refused, too, your Honor?

Mr. Strong: No. 39, your Honor.

Mr. Carr: I would like to get the marking on 38 first.

The Court: 39 was inserted some other place, was it not?

Mr. Carr: That is the rebuttal proposition stated in other terms.

The Court: What does that accompany?

Mr. Carr: I will find it, your Honor.

The Court: I inserted that in some other place in your instructions.

Mr. Carr: That is 22.

The Court: 39, is it not?

Mr. Carr: Yes.

Mr. Strong: That is objected to, your Honor, for the same reason as 22 and 38, and for the additional reason it deals with a lack of knowledge on the part of defendant that sugar rationing had been continued beyond June 30th. There was no discontinuance of sugar rationing at any time. That was under the Second War Powers Act, and there was no act of affirmative discontinuance by the President of rationing. It [563] just stated the effect.

Mr. Carr: That is really news to me, your Honor. Mr. Strong is really making law faster than the Supreme Court can make it.

Mr. Strong: That's impossible, your Honor.

The Court: Well, I have passed on that question: not given, and exception allowed to the defendant. I passed on that several times, gentlemen. All right.

Mr. Strong: No. 40 is the defendant's last one. We object to that, your Honor.

The Court: Where did that fit in?

Mr. Strong: That is just by itself.

The Court: A separate instruction?

Mr. Carr: Yes, your Honor. Do you have it, your Honor?

The Court: It did not fit in any place. I do not have it, gentlemen. No, I do not have No. 40.

Mr. Carr: Shall I pass it up?

The Court: Yes, please.

Mr. Carr: You have one, Mr. Strong?

Mr. Strong: Yes, I have a copy.

The Court: Let me see Exhibit 1, please.

(The court obtains document from the clerk.)

Mr. Strong: May I submit to your Honor that this instruction has nothing to do with the case as it stands in its present posture. May I add a further reason, your Honor? [564]

The Court: Yes.

Mr. Strong: The further reason is that that is not the evidence. At least one witness testified that the defendant Paul J. Ziegler told him that he was still a partner of the West Coast Supply Company. I believe that was the witness Pool from the Department of Health. In addition to that there are in evidence documents which the defendant admits he filed with the Office of Price Administration in which he, in his own handwriting, wrote that he was a partner of the West Coast Supply Company.

It is true that on the stand he says that that is not true. But at the time he wrote them there was a penalty provision on those things, and I don't see any reason why his statement on the witness stand should be given any more weight than his original statement to the jury. I think that is a question for the jury, if it is a question at all in this case. This instruction would completely remove that matter from the jury's determination.

Mr. Carr: That is the reason I proposed the change because there is not one iota of evidence, legal evidence in this case, to sustain that Mr. Ziegler is a legal partner. And the law is so well settled—I will stop if your Honor

wants me to and cite the cases—that you cannot prove agency or partnership by the acts or declaration of the agent or partner. [565]

Mr. Strong: That is the law, your Honor, as to holding the other partners to civil liability under certain circumstances. But in determining whether the defendant himself was or was not a partner, insofar as any liability may attach to him personally, without regard to the other partners, I think his declarations, certainly his written declarations, are sufficient evidence to permit a finding that he was a partner, even though such a finding may not be valid as against the other partner himself. As against him I think it would be valid.

The Court: Mr. Carr argued that matter at the beginning of the trial, and that was my reaction to the law, Mr. Carr. He could not bind the other partner by his declaration, but a partner might bind himself by holding himself out and making statements and filing reports.

That was my interpretation of the law, that he could be held himself.

Mr. Carr: Well, your Honor, a person cannot be held criminally liable for an act which is not proved. In other words, you cannot prove it is a matter of procedure. You cannot prove partnership or agency by an act or declaration of an agent or partner.

That is all the evidence the Government is relying on in this case, and I submit that it is erroneous to let the jury pass on partnership with just that evidence in. It requires additional evidence. [566]

The Court: What additional evidence, Mr. Carr?

Mr. Carr: To prove a partnership, your Honor, you cannot ever, even in a civil case, use the act or declaration of the agent or the partner.

The Court: Against the other partners?

Mr. Carr: Against any of the other partners.

The Court: Against himself only?

Mr. Carr: To establish the fact of partnership.

The Court: What about himself?

Mr. Carr: You might create an estoppel in certain circumstances against the person from his denying being a partner in a civil case, but that would not apply in a criminal case. I see your Honor's point.

The Court: That is what I was worried about when you first mentioned the law.

Mr. Carr: Well, there is no doubt about it. If Mr. Ziegler signed a note, for example, he could use the word "partner" or "agent." He himself would be estopped in a civil case from denying that. But it could not bind him and prove the fact of partnership otherwise.

The Court: I am just limiting it to Mr. Ziegler himself, by his own statement.

Mr. Carr: But in this criminal case he actually would have to be a partner in fact, and that is where I say the proof fails. There is no proof to show that he is a partner; and [567] equitable estoppel or civil estoppel cannot apply in a criminal case.

Mr. Strong: If your Honor please, there are no other partners in this case at all. That is my point: that the person who is the defendant is Mr. Paul J. Ziegler, and anything he is saying is used against him. It cannot possibly be used in this case against any other partner because your Honor has granted a motion for a verdict of acquittal as to the other partners, so that there is no possibility of any of this evidence being applied against them. And all that argument that tends to show that it can be applied against them is unnecessary.

Mr. Paul J. Ziegler is in the case. I don't see the necessity for instructing the jury that he is not a partner since it can only be held as against him and there may be some basis for finding against him as a partner, although I don't see that it makes any difference one way or the other.

The Court: There might be.

Mr. Carr: The vice in not giving this is this: Suppose the jury concluded that he is a partner; then they are saying, his being a partner, he is issuing a check carried by the account of the partnership.

The Court: Yes. The authorization I have examined carefully, Exhibit 2 of the Government. It says:

"West Coast Supply Co., 1654 Long Beach Ave. Authorized [568] signatures—Name and title (Print)—Raymond Ziegler Managing partner."

Then written in ink the signatures "Raymond Ziegler, J. H. Ziegler, Paul J. Ziegler, Paul M. Fox" and printed "Paul J. Ziegler" in pen, "Paul M. Fox" in typewriting and then "West Coast Supply Co. by Paul J. Ziegler" over "Signature of applicant."

This Exhibit 2 does not indicate, as I take it, that Paul J. Ziegler was a partner. This does not indicate that Paul J. Ziegler was a partner by this instrument.

Mr. Strong: No.

The Court: There is other evidence. I appreciate that. I think it might be confusing.

I am going to give this instruction. What is next?

Mr. Strong: Does your Honor say you will give it?

The Court: Yes.

Mr. Strong: That is all the defendant's, so far as I know.

The Court: All right. What do you have now to offer?

Mr. Strong: I have an additional one which has not been covered, substitute instructions 11 and 12.

Your Honor will recall that on instruction 11 there was some question about rewording the count phase of it. I have reworded it now.

The Court: No. 11? [569]

Mr. Strong: Yes, sir.

The Court: All right. Mr. Carr?

Mr. Carr: Well, your Honor, that has been covered. I thought counsel on Friday was satisfied with the instruction I had drawn covering that. As I recall, he said he was.

Mr. Strong: Which one was that?

Mr. Carr: Let me see. Instructions 24 and 25, as I remember.

That would be 25 in this case. So that is a repetition of that, and it has some matter in it that I question, your Honor.

The Court: No. 25?

Mr. Carr: Yes.

The Court: All right. Did you substitute something for No. 25?

Mr. Carr: No, your Honor. 24 and 25 are the two that cover the general definition of the crime.

Mr. Strong: If your Honor please, I think he is right. I will withdraw my 11 and 12.

The Court: All right.

Mr. Strong: And that is 24 and 25. That was an oversight, and I apologize for taking your Honor's time.

The Court: Yes. I have No. 25 here. I assumed that was the situation.

What else?

Mr. Strong: That is all, your Honor. [570]

Mr. Carr: May I have just one second, your Honor, to consult with my client?

The Court: Yes.

(Brief pause in the proceedings.)

Mr. Carr: Your Honor, could we have a recess for a moment? I have a lawyer, you know, for a client; and I am not under the same situation as Mr. Strong is, the whole Government.

The Court: Yes. I have had experience both ways, Mr. Carr, as United States Attorney and an attorney.

Do I understand, Mr. Carr, you are objecting to the definition of "alteration"? Do you want that in the record?

Mr. Carr: No, I am not objecting to that, your Honor. The only thing I was insisting is that you add my instruction which I think you refused under the regulation.

The Court: Mr. Carr has made some objections to some of the Government's instructions as applying to the case.

Here is an instruction that I am going to give:

"The court is giving you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their applicability depends upon the light in which you view the evidence. The fact that the court has given you instructions as to a particular rule of law must not be taken by you as an indication that such rules are [571] necessarily applicable to the cause on trial or as indicating that the court considers them necessarily applicable. Where there is a conflict of evidence, the question as to

whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are; and the jury are the sole judges of the facts.

"If an instruction is applicable only if a particular situation or state of facts exists and if you find that no such situation or state of facts exists, then you should not take such instruction into consideration in your deliberations."

Mr. Strong: Is your Honor giving that for my benefit?

The Court: No, I am giving it for Mr. Carr's benefit.

Mr. Carr: That's really astounding, your giving it for the benefit of both sides, your Honor. I don't see any objection to it.

The Court: I think that it applies because you have made the most objections to the Government's instructions.

Mr. Carr: Yes.

The Court: Though I followed the theory of the Government, which, in my opinion, is correct, I shall not give it if you do not want it.

Mr. Carr: I am perfectly willing to have it.

The Court: Mr. Strong? [572]

Mr. Strong: If your Honor please, I am not quite clear now as to whether your Honor is giving that instruction in connection with my request that certain other parts of Government's instructions 5 and 6 be given which were heretofore deleted.

The Court: I am not giving it in connection with anything. I am giving it as an independent instruction by the court, unless there is objection.

Mr. Strong: Yes, your Honor. But may I ask in that connection if your Honor is going to give only that part of Government's instructions 5 and 6 which were

heretofore agreed to? Or whether your Honor has expanded it to give all of the parts which I originally included in Government's instructions 5 and 6?

The Court: 5 and 6? We will clear that up. On Friday it was agreed that Government's instruction No. 5, the first part thereof, should be out and that the second paragraph should be out.

Mr. Strong: And the fourth.

The Court: And the fourth paragraph should be out.

Mr. Strong: That is the way it stands now, your Honor?

The Court: Yes.

Mr. Strong: Yes. All right.

Mr. Carr: There is one sentence in the third paragraph out, your Honor, too, I believe. [573]

The Court: Let me see.

Mr. Carr: The last part of the sentence.

The Court: In the third paragraph?

Mr. Carr: Wasn't it starting with the words ". . . or that it must not be required in accordance with the ration order by the person tendering it"?

I thought that was cut out, too.

The Court: I do not have it on my notes. Let us get it straight, then.

Mr. Carr: I may be in error, but I have it marked that way.

Mr. Strong: There was some discussion, and your Honor left it in.

The Court: I have not marked it out, Mr. Carr.

Mr. Carr: I may have made an error about it.

The Court: The last paragraph was out, and all of No. 6 on page 1 is out. The paragraph starting at line 4, the second paragraph, is in; and the next one, the para-

graph starting at line 8, is out. The next paragraph starting with Section 22.13 (b) is out, and starting with line 25, Section 24.1 (c) "Definitions" and to the bottom of the page is in.

The top of the first paragraph on page 3 is out. "(18)" on line 7 is in, and "(19)" is out because it is duplicated.

Mr. Carr: I see. I have it marked.

The Court: That is the way I have it. Is there anything [574] else, Mr. Carr?

Mr. Strong: Then your Honor is giving on page 7 lines 22 and 23?

The Court: On page 7?

Mr. Strong: That is just the preceding page.

The Court: I do not have page 7. I have pages 1, 2 and 3.

Mr. Strong: Yes, it is marked page 2.

The Court: What is your point?

Mr. Strong: Line 22 where it says:

"By 'evidence' is meant sugar ration checks, coupons or stamps."

The Court: Yes. But I have stricken out the paragraph above it.

Is there anything else?

Mr. Strong: No.

The Court: Mr. Carr would like to have a little breathing spell. We will take a ten-minute recess.

(Brief recess.)

The Court: Stipulate the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulate.

Mr. Carr: So stipulate, your Honor. I have one further [575] instruction to propose to the court.

The Court: All right.

Mr. Carr: At the request of my client.

The Court: All right.

(The following discussion had outside the hearing of the jury.)

Mr. Carr: If you will refer to instruction No. 36.

The Court: Of yours, Mr. Carr?

Mr. Carr: Yes.

The Court: Just a minute.

Mr. Carr: Yes, the defendant's requested instruction No. 36.

The Court: Just a minute. Is that in connection with some other one?

Mr. Carr: I didn't have time to write out the instruction; so I am going to ask the court to give an additional instruction. I am going to graft part on to an instruction, your Honor.

The Court: All right.

Mr. Carr: On instruction No. 36 I request the court to give down to and including—my lines are not marked—down to line 15, through and including the words “. . . it is necessary that . . .”

I propose that part and add to it this, your Honor:

“. . . you be convinced beyond a reasonable doubt as [576] to each count that Paul J. Ziegler was a depositor or that at the time of the delivery of the checks that

he drew or purported to draw the check or checks on the account of a depositor as defined above."

Shall I read that back to your Honor? It may be a little confusing now. It will now read:

"It is a material part of the charge in Counts 1, 3, 5 and 7 that defendant, Paul J. Ziegler, issued a sugar ration check, or checks. In order for the Government to sustain the proof respecting this material ingredient, it is necessary that you be convinced . . ."

The Court: Now, just a moment until I get that. Yes?

Mr. Carr: ". . . you be convinced beyond a reasonable doubt . . ."

The Court: Yes?

Mr. Carr: ". . . that as to each count Paul J. Ziegler was a depositor or that at the time of the delivery of the check or checks that he drew or purported to draw the check or checks on the account of a depositor as defined above."

Mr. Strong: On that instruction, may I be heard on that?

The Court: Just a moment. I would like to understand it.

Mr. Strong: I am sorry.

(Brief pause in the proceedings.) [577]

The Court: I will hear from you now.

Mr. Strong: Beg pardon, sir?

The Court: I will hear from you now.

Mr. Strong: The thing that I object to in the main is that clause of that phrase which begins "at the time of

the delivery" because I think that if at the time of the delivery, if it means at the time that he physically handed the check over or put it in the mail, that then the instruction is erroneous as requested. If by that they mean that a check is delivered when it is complete on its face, which would mean beyond the time at which, as one of the witnesses testified, he put in a certain insertion pursuant to authority of the defendant, that might be another matter. But if delivery here is intended to mean at the time it left the hands of the defendant, I submit, your Honor, that that is not the law because the check need not necessarily be complete at that point.

The Court: I think, gentlemen, that that matter is covered in all of the instructions I have.

It will be denied and exception will be allowed the defendant.

(The following proceedings within the hearing of the jury.)

The Court: You can understand, ladies and gentlemen, the care with which we must consider all of these matters. That is the reason that you have had some time to wait. But it is very necessary that the court and the attorneys work on [578] these matters very carefully.

The arguments have been limited to an hour and a half on each side. How much time would you care to open with, Mr. Strong?

Mr. Strong: Well, I will try to open within 45 minutes, and I will try to complete it within 15 minutes more in my closing; so I will probably limit my total time to only one hour.

The Court: You are allowed an hour and a half on each side. I am just trying to figure the time now. If

you occupy 45 minutes, that will take us until 4:30. And I think I shall recess then because it would be necessary for Mr. Carr to make all of his argument at one time, and that would keep the jury here until after 6:00 which I think is unfair to the jury.

Mr. Strong: May I take my full hour, then, in the opening? I was just trying to cut the time.

The Court: That would be a quarter to 5:00, if you desire to do it.

Mr. Strong: I will probably finish sooner than that.

The Court: Well, whatever time, of course, is left you may use in rebuttal.

Mr. Strong: Thank you, your Honor.

The Court: It is entirely up to you.

All right, Mr. Strong. [579]

OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT.

Mr. Strong: Your Honor, gentlemen, ladies and gentlemen of the jury, this has been quite a long case; and you have heard quite a lot of evidence.

As I told you in my opening statement, that at that time I was going to give you a brief outline of what I hoped to prove during the trial. Then you heard the evidence and the documents were introduced.

Now we have reached the point where it is my function to take up all these pieces of evidence that were put in as though they were parts of a jig-saw puzzle and try to put them together so as to show to you what, in my opinion, the evidence discloses here and how, in my opinion, the Government has sustained its case.

Of course, I need hardly say to you that if I say anything which you believe to be a statement of the law, I am not the one who makes any statements as to the law. His Honor will tell you what the law is, and if I say anything which sounds as though I am doing that, I am not doing it and I am not trying to do it; and you will, of course, pay attention to his Honor on the law.

In discussing the material that went into the record I shall try to recall as closely as I can what all the testimony was; and I believe that in almost every instance I can do so. But if at any time my recollection of what happened or what [580] was said on the witness stand does not agree with yours, of course yours is the controlling one. I do not intend at any time to state anything. I shall try to avoid that. If there is difference, it is simply because I do not happen to remember so well; and you will, of course, adopt your own recollection of the testimony and the evidence in the case.

What is this case all about? We have been here for a week. We have heard a lot of witnesses. A lot of exhibits have gone into the record. It begins to sound like it is a really complicated matter. The fact of the matter is it is not a complicated matter at all.

As his Honor told you, there are eight different counts in this information. The Government charges that on these eight different occasions the defendant did something which was in violation of the law. Those eight different occasions are split up. Four of them have to do with checks.

The Government charges that those checks were issued on a ration account at that time when there was not enough credit in that account to cover the checks. The

Government charges, as his Honor has told you in reading the information, as you will remember again, that that was done willfully and that it was done at a time when the defendant had reason to believe and to know that there was not enough credit in that account to cover those checks. Four of the counts, that is, four of the charges have to do with these checks. [581]

The other four of the counts have to do with getting the sugar called for by these checks. The Government charges that the defendant got that sugar and that he got it in exchange for these checks and that when he issued these checks he knew he did not have enough in his account to cover them. So he had no right to take the sugar either.

Mr. Carr: May I interrupt, your Honor? I am sorry, but the jury has not been told about there being only one defendant in the case. I do not think we ought to proceed without their being told that.

The Court: Yes, I think that is correct.

The information, ladies and gentlemen of the jury, is filed against the West Coast Supply Company and also against Paul J. Ziegler.

The West Coast Supply Company is not before you for consideration, the court having disposed of that matter; so there is only one defendant before you, and that is Paul J. Ziegler.

Mr. Strong: Now, in order to get a clearer picture of what we say the defendant Paul J. Ziegler did, what we say the evidence shows that he did, you are to carry in mind what the defendant Paul J. Ziegler was interested in, as disclosed by the evidence here.

You will remember that the defendant Paul J. Ziegler was anxious to get sugar, as he says for the company known as the "Paul J. Ziegler Company." [582]

I believe he admitted that he is one of the partners; that he and his father are partners in this Paul J. Ziegler Company, and he wanted to get sugar.

The Court: I thought it was the "John H. Ziegler Company."

Mr. Strong: John H. Ziegler Company is what I meant.

The Court: That is not what you said.

Mr. Strong: John H. Ziegler Company. I am sorry if I made a mistake. I did not intend to.

During the year 1946, in May and June and before that, Paul J. Ziegler talked to various brokers about the availability of sugar to him, if and when the OPA went off. So he was trying to get sugar all that time.

As you recall also, the West Coast Supply Company, which is no longer a defendant in this case, had a ration account at the Union Bank and Trust Company. The persons who were permitted to draw checks against that ration account included the defendant Paul J. Ziegler. And, as you also remember, the West Coast Supply Company consisted, I believe, of the brothers of the defendant Paul J. Ziegler. So that you have the brothers in the company known as the "West Coast Supply Company." And then you have the father and Paul in the company that is now known as the "John H. Ziegler Company."

I believe that Paul J. Ziegler also told you that the John H. Ziegler Company was doing the manufacturing; that originally it was a department of the West Coast

Supply Company [583] and then later on it was taken off as a separate company: the John H. Ziegler Company.

So that what it boils down to in the end, the West Coast Supply Company has a sugar ration account with the Union Bank and Trust Company; and Paul J. Ziegler can draw on it. He is one of the authorized signers on checks.

The John H. Ziegler Company did not have any ration account any place, and Paul J. Ziegler wants sugar. That gets us down to July 1st.

On July 1st Paul J. Ziegler buys some sugar, puts in orders. He calls up brokers, puts in orders for 1,300,000 pounds of sugar.

According to the undisputed testimony here in connection with the purchase of that sugar there were certain pieces of paper that went out. You have examined them, I believe. They are Government's Exhibits 3, 4, 5 and 6.

Those pieces of paper were printed showing them to be so-called ration checks of the Office of Price Administration. They had numbers on them written in ink, the date 7-1-46. Then each of these pieces of paper calls for the transfer of sugar to the ration bank account, and on each check there is inserted the name of the sugar seller.

These various sellers, vendors, from whom Paul J. Ziegler was buying 1,300,000 pounds of sugar are shown on the pieces of paper. [584]

Coincidentally these four checks add up to 1,300,000 pounds of sugar. I believe the defendant also admitted that he signed the checks "Paul J. Ziegler." That, as I said, is one of the signatures that can be used in drawing

sugar ration checks on the West Coast Supply Company account.

So there is not any dispute about the fact that these four checks exist. There is no dispute as to Paul J. Ziegler's signing them.

Mr. Ziegler tells you that it is true he signed them but he did not put in the words "West Coast Supply Co." In one instance, as I recall, one of the persons who took the order for sugar testified that Mr. Ziegler handed him the check to cover that order. My recollection is that that was the check for 600,000 pounds of sugar. That individual also testified that at the time he got the check the name "West Coast Supply Co." was not there. That is one instance.

In two other instances the persons who sold the sugar, the brokers, testified that the name "West Coast Supply Co." was on the checks when they got them. They never made any insertions. That is the way the checks came.

In one instance the broker testified at first that the name was on it. Then on cross examination he remembered, after being asked, that the name really was not on there but that what happened was that he talked to Paul Ziegler when the check came in and he wanted to return the check because [585] it did not say "West Coast Supply Co."

You remember that testimony. I think that was Mr. Barry who was here with his sister.

As you recall, Mr. Barry testified that he spoke to Paul Ziegler on the phone and that Mr. Barry wanted to return the check, and that he was authorized by Mr. Ziegler to insert the words "West Coast Supply Co." on the check.

Mr. Carr: I submit there was no evidence that he wanted to return the check. I ask counsel to be accurate.

The Court: Those are matters of argument. Ladies and gentlemen of the jury, you are the sole judges of the facts; and if counsel on either side makes a statement of facts with which you are not in accord, you will remember the evidence and decide it according to the facts. All right.

Mr. Strong: Whether he did or did not say that—and you will use your own recollection—the fact is that he also testified that Mr. Ziegler authorized him to add the name “West Coast Supply Co.” to that check. That was done.

That was step No. 1.

Step No. 2 is getting the sugar. You will recall all these various documents which were introduced in evidence which show the sale and shipment of sugar and the delivery of sugar to the West Coast Supply Company. And you will recall the young man who testified that he was the one who wrote on here “West Coast Supply Co. by Robert A. Russell.” [586]

Then he said that he was not working for the West Coast Supply Company; that he was working for the John H. Ziegler Company. You will also recall that one of the partners in the John H. Ziegler Company is Paul J. Ziegler.

The Government charges that Paul J. Ziegler got sugar without proper ration evidence in return for its being issued.

I think there is no possibility of doubt as to the fact that Paul J. Ziegler got the sugar. Whether it was originally invoiced to the West Coast Supply Company and then came to him later, or whatever the internal

maneuvers were, I don't know; and it doesn't make any difference.

The fact is he got the sugar and he is also the one who issued those four checks to get the sugar—I am sorry—those four pieces of paper to get the sugar.

This was not a windfall. It was not as though he was not expecting the sugar. He wanted it all along.

You will remember he was trying to get it all along. On July 1st that is how he went to get it.

You will recall also that the John H. Ziegler Company has no quota for sugar ration coupons or points. The only one that has any sugar ration quota is the West Coast Supply Company, so that the John H. Ziegler Company and Paul J. Ziegler could not get any sugar unless they had ration currency.

You will recall also that the first man who saw Mr. Ziegler on July 1st in the morning was this fellow Leland who came down [587] with the telegram. Part of that telegram, which he read to Mr. Ziegler, to Paul J. Ziegler, was to the effect that sugar rationing was continuing in effect, unchanged.

That was the man to whom Paul J. Ziegler handed the check or the piece of paper for 600,000 pounds of sugar.

Later on that same day Mr. Ziegler purchased the other sugar, and apparently these pieces of paper, which I think are checks, went out covering the transaction.

Now, ladies and gentlemen, what difference does it make, if any, what these internal maneuverings were? The fact is that these pieces of paper, purporting to be ration checks, were issued by Paul J. Ziegler. The fact is that he did it to get the sugar. The fact is that he got the sugar.

That is all the Government charges in the full eight counts of the information: that he issued these checks against an account which did not have a balance to cover them and that he then took sugar for which he had not issued any valid ration currency.

As to whether the account had enough balance, well, you will remember the testimony of the person who represents the bank; and his ledger sheets are in evidence. You will examine these ledger sheets, and you will find that there was not enough balance in the West Coast Supply Company accounts, all three of them put together; there wasn't enough balance to cover even the smallest of these four checks. [588]

Then if you will examine it, you will find that, as a matter of fact, the smallest one was not the one that came in first. It was the 600,000 pound one, and the others came in subsequently.

Then you will recall that man also testified that when the 600,000 pound check came in and he saw there was not enough balance in the account, he called up Paul J. Ziegler. There was some conversation on a Saturday. There weren't enough people there, or something. And then on Monday or Tuesday there was another conversation. But the sum and substance of the conversations was that the bank was told, in effect, to post it as an overdraft. "Just post it as an overdraft"!

I could go on and discuss this evidence with you for much more time than I have allowed for myself. But I don't see any point to it. I don't see the point in belaboring something that is crystal clear. I do not see the necessity of my persuading you or telling you or attempting to show you how the evidence discloses these various machinations followed by Paul J. Ziegler to get the sugar.

There is no use in my going into all the details of how this thing was issued, and what difference does it make whether Paul J. Ziegler put the name "West Coast Supply Co." or he did not put the name "West Coast Supply Co."? Is it not clear that that is what he intended be done with these checks: that they be drawn against the account of the West Coast Supply [589] Company?

Is it not clear that he knew that he could not get sugar without these checks? Else, why did he draw them in the first place?

He says he thinks that the process of rationing was over. If it was over, why did he issue these checks? Why not just buy the sugar without them? And even if it were not clear on the face of these checks as to whether the name "West Coast Supply Co." was or was not in there, do you not think that the mere omission, the deliberate omission of that name from four different checks, does that not indicate to you that that was done purposely, with the deliberate intent of having those checks go out as they were?

Does it not indicate to you that he knew precisely what he was doing because of his very great carefulness, on his own testimony, not to insert the name "West Coast Supply Co."?

This is not an oversight, in other words. Maybe it would be an oversight that you might have in one case, but this was omitted deliberately.

For what purpose, I ask you, ladies and gentlemen?

I do not care what Mr. Ziegler's relations are with the West Coast Supply Company. I do not think it makes the slightest bit of difference. And when you listen to the instructions from his Honor, you will find the law governing this thing.

One of the important things here, however, is whether Mr. [590] Ziegler acted willfully. That he did issue these documents nobody can possibly dispute, and I don't think he does.

That he did get this sugar as the John H. Ziegler Company and that he is a partner in that company, there is no dispute as to that either. So he got the sugar and issued these documents, these pieces of paper, as he calls them.

But it has to be done willfully. And his Honor will give you a definition of "willful."

I think the evidence pretty clearly shows that Mr. Ziegler was acting not only willfully but deliberately and with a specific intent to get around any possible law that might be in existence.

I will show you why. First of all, as he told you, he is a lawyer.

Secondly, you will remember he worked for a ration board.

Thirdly, you will recall he testified that he spent a large part of his time in working on just regulations of this agency and that agency, all the agencies. That is what he spent a lot of time on.

Then he himself admitted to you that he was anxious to get sugar all the time for the John H. Ziegler Company, but he couldn't. He could not. And he didn't have the ration account, neither for himself nor the John H. Ziegler Company.

Then you will remember Mr. Loud of the Office of Price Administration testified here something to the effect that Mr. [591] Ziegler was up there on some matter and that Mr. Ziegler indicated to him that he was going to get sugar.

Mr. Ziegler said on the stand, No, he never said that.

But the fact of what he was doing completely belies his own statement because it is exactly what he was doing all the time. He was trying to get sugar, and that is what he was after all the time: to get sugar. That is why he issued these four pieces of paper: to get sugar, not to just pass documents from one hand to another.

Then in the morning, as I said, Mr. Leland read that telegram to him. So even if Mr. Ziegler had some idea—I don't know where he could possibly get it—that the Second War Powers Act was off and sugar rationing was off, if he had that idea, Mr. Leland put him on notice that morning when he went over there and read the telegram; and that is when Paul Ziegler gave him that check. He told the bank to charge it off as an overdraft, you will recall, and the sugar has never been returned.

The checks were received; they went through the bank. The bank officer testified that they sent the monthly statement and nothing was returned.

I don't think there is any question as to his knowing what he was doing. I think that that is exactly the thing in this case. He knew so well what he was doing that he tried to wiggle this way and that way and any way he could possibly [592] wiggle to get that sugar, although he knew he was not entitled to get it, although he knew that he did not have any ration account; that he could not draw against any ration account except the West Coast Supply Company's.

That, I think, is precisely what is shown here. You heard Mr. Ziegler testify. One thing that impressed me very much—I don't know whether it impressed you or not, but it certainly impressed me—that in trying to get something from the OPA for a long time back—1945—

he wanted to get some allotment of sugar from the OPA. He used the word "partner—West Coast Supply Co."—when he admits that he was not a partner.

Mr. Carr: I am going to assign this form of argument as error and prejudicial.

The Court: Let the record so show.

Mr. Strong: Now, on another occasion on these documents, which you can look at yourself—you will remember his testimony—he did not hesitate to call himself a partner in the West Coast Supply Company for the purpose of accomplishing the result that he sought by the use of those documents. That did not stop him in the least.

I think that that demonstrates his character, if nothing else does. I think that that is your answer to every one of the acts here.

Mr. Carr: At this time I wish to assign that as error, [593] your Honor. He is referring to the character of the defendant. The defendant's character has not been placed in evidence, and I specifically assign that as error and move for a mistrial.

The Court: Let the record show the statement of counsel.

Mr. Strong: Consider all those things when you are examining the facts as to the issuance of those pieces of paper.

Consider them when you are trying to figure out—although I don't know what you need much to figure here, frankly—as to why he did it the way he did. And consider those facts when you are considering every one of the defendant's statements as to why he thought or knew what the law was or did not think, or whatever it was. I don't remember. You recall the statement, I am sure, much better than I do.

But remember—remember always—that the checks were issued. Whether they were issued in the form he says or some other form, those documents went out in connection with the purchase of that sugar; and Paul J. Ziegler, a former member of the ration board, a person who was handling these matters on behalf of the West Coast Supply Company, as he himself testified—Paul J. Ziegler was the man issuing these pieces of paper in connection with that sugar and that Paul J. Ziegler is now or was at the time of these incidents, as he says, a partner in the John H. Ziegler Company and that the John H. Ziegler Company, with Paul J. Ziegler as partner, got that sugar, [594] regardless of whether it was consigned to the West Coast Supply Company or not. They got that sugar, and they issued no valid ration evidence in return for it.

As I said, when I started, I could go on analyzing this for hours. But I see no point to it. I see no point to bringing before you something that you are undoubtedly as well aware of as I am, if not more.

The Court: I do not suppose, Mr. Carr, you want to break your argument up?

Mr. Carr: I don't mind one way or the other, your Honor. I am willing to go on now or not go on. It is entirely up to your Honor.

The Court: If you care to use any time now, you can continue in the morning and finish your argument in the morning.

Mr. Carr: I will use part now.

The Court: All right, you use whatever part you desire, Mr. Carr.

ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. Carr: I do not like this claustrophobia feeling, your Honor. May I move this lectern?

The Court: Certainly. The bailiff will do it for you.

Mr. Carr: If the court please, ladies and gentlemen of the jury, there are so many things involved in the trial of a criminal case that it is difficult for even a lawyer with years of experience or even a judge to nestle in or corner the various [595] angles of a lawsuit so that you may fully comprehend the issues.

I do not say that to reflect upon you. I am not here to cajole you, to beg with you, plead with you. I am here as a lawyer, as an American citizen, with the privilege—and a great privilege—to stand here and talk to you as common sense human beings, as men and women.

I may be in error in some of my conclusions; but I am certainly sincere when I try to prove to you that the facets of this case are such that it does not in any way warrant a conviction of this defendant, not on one count.

Now, you know, we sometimes lose sight of the real thing in a trial. It is not for me to stand here and try to impress you on forensic ability or whether or not I have the intellect to deceive. That is not the question. The question here is one of justice and equity and decency, of whether or not a man is charged with a specific offense and whether the Government has proved that offense beyond and reasonable doubt.

I do not say this to criticize Mr. Strong in his argument. But it is just such arguments as he makes that will convict an innocent defendant.

I have here the Third Revised Ration Order which is a document comprising, if I can find the end of it, 32 pages

of offenses, regulations and rules. That is only one of the ration orders involved in this case. [596]

And when counsel gets up and makes his argument, at least by inference, that the man has done something wrong, that is not the question here. That is not the question, whether he did something wrong or immoral or unethical.

You are here to determine whether or not he violated two specific sections.

Perhaps the evidence might show that he violated 5,000 sections. But that is not your problem.

You are here to determine: Did he violate the specific sections which are set forth in that information?

And please don't, by any stretch of your imagination, become confused on that proposition because I am sure if you were on trial, you would want to be tried on the specific charge. If you were accused of shooting a horse, you would not want to be convicted of drunk driving.

So I am going to take this information and I am going to try to break it down to the best of my ability so that you will know what the specific charge is. I am not going to go on the theory that if you find that he did something in violation of one of these rules or regulations, then you should find him guilty.

My heavens! I don't think there is a human being alive, including myself, that has not violated some of these rules and regulations in some way. I perhaps have violated a thousand of them; I don't know. [597]

The question is one of intent and, "What section am I charged with"?

Let us take this information and see what it charges. Count One represents, in effect—although it covers dif-

ferent transactions—an aquation such as in Counts Three, Five and Seven. In other words, the allegations are the same except for the amount of the check or the amount of the sugar. So if I deal with Count One, I am really, in effect, dealing with Counts One, Three, Five and Seven.

When we analyze that Count One we have analyzed those four counts.

Here is what it says at the top of the page, giving the section number of Third Revised Ration Order. Here it is right in front of us:

“3d Revised Ration Order No. 3, Section 15.7 (d).”

Now, let us read that and see what it says. This is the charge on Count One with the facts set out afterwards.

Section 15.7 (d) reads very simply as follows:

“Overdrafts prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Simply stated, it is the same thing as if I wrote a check on the bank for \$50.00 and I only had \$25.00 in there; and the check being drawn on that account, that would be an overdraft. [598]

Let us see what it charges.

First “. . . (the defendant) willfully and unlawfully performed acts prohibited by Section 15.7 (d) of Third Revised Ration Order No. 3, in that said defendants did willfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn. . . .”

“On which it was drawn”: keep that in mind.

“ . . . less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Union Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of six hundred thousand (600,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles. . . . ”

A particular bank, a particular account!

“ . . . when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.”

In other words, here are the elements: you have got to prove the defendant willfully—that is one thing—and deliberately intended to violate that particular law; that he had it in mind to violate it; that he actually issued a ration check. And a ration check is a check, under this order, that is drawn on a ration account. [599]

Now, in discussing this I recall what Mr. Strong had to say. One moment he has to say this:

“Well, at least impliedly the names were on the checks.

“ ‘West Coast Supply Co.’ was on there.”

In the next breath he tells you:

“He deliberately left them off of the checks because that was the plan to get sugar.”

Now, which side of the dilemma is he going to take? As a matter of fact, I think there is some basic lack of cricket in this case as far as the Government is concerned, if you want to get it that way. Let's analyze it.

Counsel calls to the witness stand witnesses to testify under oath on behalf of the Government, witnesses who get up on the stand and testify.

First Barry says, "The check is in the same condition as it was when I received it." •

But low and behold! After a little questioning, first Mr. Barry could not remember about that name "West Coast Supply Co." being on there; but he finally remembered it. And then he remembered it so quickly that it was like unlocking a box and the whole thing just shot out like a rubber ball or something which had been squeezed into a box.

The Government comes into court at the outset of this case amending its information. It read originally:

"A sugar ration check drawn by said West Coast Supply [600] Company. . . ."

But now it reads by amendment:

". . . check drawn by and on behalf of said West Coast Supply Company and Paul J. Ziegler. . . ."

Do you mean to tell me that counsel never had a suspicion that those documents had been altered? Why the amendment? Why does he come into court and change it?

There is a simple problem here to be solved, and that is whether or not this man is guilty of an offense. We are not here to test out who can win or lose a case.

Another thing in the realm of cricket I might point out to you: He strains at the mountain to bring forth a gnat to prove that this man is a partner of West Coast Supply Company—by what method? By once or twice a statement supposedly made. But he has in his own possession documents, original registration certificates, which he does not offer in evidence which show who the partners of West Coast Supply Company were. I had to offer that in evidence.

I want to show you those because right on these exhibits, which I had to get from the Government right here in court, they had the original registration certificates showing who the partners were.

But now counsel has changed his tune. He started out on the theory that he was going to prove that the West Coast Supply Company received the sugar; and because the defendant gets up [601] on the witness stand and honestly tries to tell the truth, now he changes his tune and says, "No, Ziegler Company got the sugar."

Well, he had this group of investigators. My heavens! They came here by squads. They had four down there the day that Paul Ziegler, a lawyer, by the way, went down to the OPA.

Now, if this isn't the most ridiculous thing that I ever heard of, Mr. Loud gets up on the stand and says that a lawyer, in his right mind, who has been practicing at the bar, makes a special trip down to the OPA in February of 1946 and in the presence of four investigators tells them, "I am down here to tell you I am going to get sugar, and you are not going to stop me."

Now, isn't that the most ridiculous thing you ever heard of? Why, a common ordinary school kid would have sense enough, if he were going to go out and cheat the law, not to go down to the FBI and call out the special agent in charge and say, "You had better watch me from now on. I am going to start to violate the law."

If that makes sense, maybe I should go back to school and start over again because I can certainly imagine one Charles Carr being caught at the OPA with four agents telling them, "Watch out from now on. I am going to start to violate the law."

That's really something for the books.

The gentleman who was a police officer back there on the [602] jury, I doubt if in all his career he ever had any such thing as that happen that the burglar came in and said, "Watch me. I am going to rob the bank next week."

Just take a look at Defendant's Exhibits A and B. They reposed in their possession here as quietly as anything could repose. Right on the face of it says: "West Coast Supply Co. Wholesale Department, 1654 Long Beach Avenue, Los Angeles—Los Angeles—Calif. . . . J. H. Ziegler, Allen Ziegler & Raymond Ziegler, partnership." That is one of them. Here is the other one: "West Coast Supply Co. . . ."

Now, he had those in his possession. Yet by the flimsy little tissue he tries to establish first that Paul Ziegler is a member of the West Coast Supply Company by the statement that some anthrax department of food and health inspector went down to find out something, to get a delivery receipt or a check signed, or something. And he says, "Somebody down there told me. . . ."

At least he thinks they did.

". . . Paul Ziegler was a partner of the West Coast Supply Company."

And then down goes the A.T.U!

It is a good thing it was not in war time. They might have had the army down there. And about all they can find out is that somebody said, "Paul Ziegler is a member of the West Coast Supply Company."

The Case progresses, and counsel suddenly starts to learn [603] the fact that he should have known long ago in the case, and then he changes his tune. He says, "Oh, oh! If Paul Ziegler isn't a member of the West Coast

Supply—of course, we have proved up to now that the West Coast Supply bought the sugar, and since the defendant went on the stand and proved that he really got it, why, we will change our tune and say he is guilty of getting the sugar and we will forget all about these other facts.”

So go back to the information, please, ladies and gentlemen. Don't do me any favors; don't do anybody any favors. Just do the just and proper thing and see that the charge is proved as made in this information. I don't care whether you like my looks or whether you like the defendant's looks or whether you even speak to me and meet me on the street. That has got nothing to do with it.

I am not here to try to twist your intellect, but I am here to try to stimulate your intellect so that you use the ordinary common sense and decency, justice and common sense which I know you certainly have.

Now, on Count Two it is charged—and that is the same as Counts Four, Six and Eight, except the amounts of sugar are different—it charges and at the top of the information we find “General Ration Order No. 8, Section 2.9,” “2.8” being stricken out and “2.9” left in.

Incidentally, that is a pretty good indication of how [604] doubtful the Government is about these criminal things. Apparently they did not know themselves of what he was guilty. They put something down and had it marked out. But I suppose the time is coming in this day and age when the Sermon at the Mount will not be sufficient to regulate our conduct. At least, the man who is going to obey the law, if he is going to be convicted without its being willful, is going to have to sit up into

the long wee hours of the night and burn out a lot of spectacles to keep up with things.

I will tell you very frankly, I am supposed to be a lawyer. I have been practicing just about 21 years. I graduated from two mighty good universities; and since I got to work on this thing I don't even know what a violation is half the time. Yet when a man goes down in broad daylight, he has got a legitimate business enterprise and he is not in any black market; the evidence shows he is running a legitimate business enterprise and he goes out in a business way in broad open daylight trying to get sugar.

Now, when counsel brought this out, you would have thought he was singing tenor when he hit that "1,300,000 pounds."

I don't care if it is one billion three hundred thousand. You are not here to convict on the amount of sugar. The question is if he got one pound or two pounds or two million pounds, that is immaterial if he got it illegally and in violation of the law, as charged. If he did not, he should be [605] acquitted. So let us not sing with glee upon the phrase "one million three hundred thousand pounds."

Here is a man in broad daylight, ladies and gentlemen, walking the streets, watching the OPA die in Washington. And I'll bet you that some of you people knew that that was happening in Washington.

You know, strange as it may seem, I knew that was going on myself. And the papers were carrying something about the fact that they were debating day by day what would happen to OPA in May and June of 1946. I even have a suspicion that a couple of people in this

country might have thought OPA was dead on June 30, 1946.

If I remember correctly, I think a few people started even to raise rent prices. Of course, I am not trying to confuse you now between rationing and the Emergency Price Control Act.

What I am trying to bring out is this: here is a lawyer who believes that OPA's power to ration is derived from the Emergency Price Control Act of 1942. I thought it, and I will defy anyone to produce me six great lawyers, and I will bet you that five out of six thought the same thing.

On June 29th the President vetoes the OPA extension bill. The country shouts its death. OPA is gone. The next day the President goes on the radio and explains why he vetoed the OPA bill.

Don't you think somebody might have suspected that that [606] meant the whole OPA program; that even a lawyer might be confused on that?

At any rate, we have the facts to show this: that up until that date Paul Ziegler had not bought a pound of sugar. He was sitting on the sidelines watching as any businessman would watch saying to these people, "If and when OPA dies I want to get some sugar."

What is foolish about that, a man in a legitimate enterprise who can't get sugar? I suppose he is supposed to close up his doors and kick his employees out and go home and put a sack over his head. But he did not do that. He walked the streets watching OPA draw its deathbed last breath. And OPA died, that is, the Emergency Price Control Act died.

Sunday, the 30th, the President promulgated Executive Order 9745, I believe the number is—and if I am not right I shall correct it later—and the following morning that was filed with the Federal Register in Washington which purported to continue the power of the OPA over rationing.

That was filed with the Federal Register in Washington, and I am sure all of you knew all about it on July 1st. I am sure you knew exactly what this order had in it. It was signed on July 1, 1946, "Harry S. Truman, The White House."

It was actually filed July 1, 1946, at 10:32 a.m. That is Washington time.

Here is a man out in Los Angeles a few thousand miles [607] away who has been watching OPA die, and he thinks, "Now is my chance to get sugar." So he leaps out of bed Monday morning, flies down town and buys some sugar. And he is supposed to know and have the willful intent to violate this document filed at 10:32 a.m. in Washington, D. C.

Well, that's one for the books. As a matter of fact, the evidence shows—and you will recall it—that Mr. Ziegler came to me to consult me about this document.

I think, if I remember correctly—and I am sure that the evidence shows—it was received in the office of the United States Attorney in Los Angeles on July the 9th and that sometime thereafter I acquired this from the United States Attorney. Then I read it, and we didn't know a whole lot more than we knew before we got it.

At any rate, all of the sugar had been delivered. If you will just remember back and reflect on the evidence. all of the sugar had been delivered on July 12, 1946.

Let's don't get off into any confusion about these deliveries from the warehouse to the plant. When I say "delivery" I mean that the sugar bought in this case had been paid for and delivered to the warehouse, the Overland Terminal Warehouse, by July 12, 1946.

That has a very significant bearing on this case because they have got to prove that he willfully, if they can prove anything, violated the law as set up in Count Two in receiving [608] the sugar.

Of course, what a lawyer is always up against is the question of whether to put the defendant on the stand. I could have sat quietly in this case and never put Paul Ziegler on the stand, and they probably would have convicted the West Coast Supply Company of receiving the sugar and might even have had that upset. But we did not do it.

Here is a document that came into the hands of the defendant sometime, the evidence would indicate, after the 12th, after the sugar had actually been received.

I submit, my friends, how can a man deliberately intend to willfully violate something like this file in Washington, 2,500 miles away, when in good faith he is out here purchasing sugar and has no knowledge whatsoever?

Should men be put in the gig for a thing of that kind? If Mr. Ziegler were intent upon violating the law, ask yourself this way: why didn't he buy it from these brokers in May or June?

You don't mean to tell me that those brokers would have been too touchingly reluctant to sell their sugar if he had signed a check then? There is another little aspect of this case you might give some thought to. You know, if you give me something, a pair of dice, and just

as you hand me the dice the police walk up, it is awfully natural for me to try to get rid of the dice. [609]

That is just what it looks like in this case. They got Mr. Barry. Mr. Barry may be a fine gentleman. I have no fight with him. But he comes up here and gets on the witness stand and says at first, "Why, no, that name was on there."

Of course, Mr. Barry knew that he could be prosecuted for an offense himself. But I suppose when you make a choice between who should be the defendant and the witness, you flip a coin. I don't know whether Mr. Strong flipped a coin or not, but if he did I am awfully sorry it landed on Paul Ziegler instead of on Barry.

As to Mr. Barry, naturally I don't know that I blame the man. He gets up on the stand and he says to himself, "What the devil! They have got all these regulations here, and I am taking a check. The West Coast name is not on there. So why should I stick my neck out?"

He was protecting himself. He wanted to sell the sugar.

You recall Mr. Ziegler said that either Leland or Barry said the warehouses were stocked up with sugar? Well, he was perfectly willing to sell it so long as he did not get in trouble himself.

When they come up here and tell you, anybody even starts to tell you, that they did not know about the West Coast Supply Company name not being on those checks, why, that is the most ridiculous thing in the world. Even the prosecution showed that the first day when they amended the information. [610]

You know, a person, I suppose—a lawyer and everyone else—rambles a lot in these things. Your mind gets

ahead of your thinking sometimes and you get to talking. It is like talking over a cup of tea. You sort of get off on tangents.

I want to get back again on the main track for a moment of the word "willful."

Aside from that most astounding statement of Mr. Loud that a full grown lawyer supposedly with his senses about him, comes down and holds up a red lantern and says, "Watch me from here on. I am going to violate the law."

Other than that statement, I submit on the question of intent Mr. Strong stands upon this proposition and only on this proposition. It is kind of a trick argument. You have to sort of tear it down and break it to pieces, or it will throw you.

Well, he says, "He signed checks, didn't he? If he knew there was no OPA program, why did he sign the checks?"

Let us see why. This telegram purports to come from someone who said the Commodity Credit Association says that the OPA rationing shall continue, and so forth and so on. Well, I did not know the Commodity Credit outfit was running the show. I guess a telegram from them to someone to someone else might possibly have made the average person think, "Well, maybe there might be something to the thing." I don't know.

Here is a lawyer who thinks he knows a little something. [611] He has been working in this. He has not bought any sugar in May and June. He is assuming that the OPA is running during those two months. So he comes along and on July the 1st he says, "All right. Now I want to get the sugar." So—I forget whether it was

Barry who brought the telegram—not Barry but the other fellow. What is his name?

Mr. Strong: Leland.

Mr. Carr: Leland, the man who brought the telegram. Let us analyze that telegram. Let's see what is in it.

"Pending further action by Congress on price control request that all processors, refiners and importers continue selling at prices in effect June 30. . . ."

Well, that is nothing but a request.

"Commodity commitments under outstanding contracts and programs will furnish basis for continuing operations until further situation is clarified. . . ."

Well, somebody else is not fully clear on the situation.

"Congress has authorized commodity credit to continue its 1946 sugar program and has shown willingness authorize 1947 sugar program. . . ."

We are even up in 1947 now.

"Will appreciate reply by telegram as to your policy. In view (of) extension Second War Powers Act rationing and allocating sugar and molasses continue in effect unchanged." [612]

Well, if it continued unchanged, then why did the President feel it necessary to get out and sign this executive order? He did not need it. So the President was just wasting his time?

Either this fellow is wrong or the President is wrong. Somebody is wrong. There was some confusion about this proposition because if it continued just as it was, then why did President Truman have to turn out Executive Order 9745 in which he says:

"The Office of Price Administration and the Price Administrator are directed to continue to exercise and perform all those functions, powers, and duties vested in them under or pursuant to the Emergency Price Control Act of 1942, as amended, and the Stabilization Act of 1942, as amended, which do not terminate by reason of the termination of those Acts on June 30, 1946, and all functions, and duties delegated to them under or pursuant to Title III of the Second War Powers Act, as amended. . . ."

Well, if this telegram is right, then this is wrong. So the President and the Attorney General of the United States, who advises the President, must have thought that they had to have an Executive Order to continue the rationing program.

Now, Mr. Ziegler's mind was simply this: "OPA is dead. It is Sunday. I can't do anything today, but Monday morning [613] bright and early I am going out and buy some sugar."

And he went out and bought it in broad open daylight just as anybody would buy anything. If he were going to violate a law and pull a lot of tricks, don't you think he would have had cash and gone down and bought the sugar for cash? Yet he draws checks on a bank account, nothing hidden about it.

Therefore, this case is simple.

To go back to the checks, why did he sign the checks? He goes down to the brokers and one of them says, "Look, they tell me that the Second War Powers Act, according to this telegram, is continued. There is still a rationing program."

Ziegler says, "Well, OPA died. How can there be a rationing program on sugar?"

"Well, we don't know, but we have this telegram."

So Ziegler says, "Well, I want sugar."

He sits down and writes what is not a ration check. It is nothing in the world but a plain check. The name "West Coast Supply Co." was not on there. He wrote out the check "Paul J. Ziegler," and he gave it to them. In other words, if he could not get the sugar from them, he, thinking the OPA was dead, why should he not get it that way? What is wrong with that?

If I were in business and a man came to me and said, "You owe me \$50.00. I am going to break your neck if you don't pay me." [614]

I say, "Bub, I don't think I owe you \$50.00." And he says, "Well, you are either going to pay me or fight."

I don't want to fight. I say, "I have a check here. I will give it to you."

He says, "Okay." There is no fight. I give him the check on a dead account, a dead bank, defunct and out of existence.

That is what Mr. Ziegler did, and he did not think the OPA was in existence. The name "West Coast Supply Co." was not on the check, and he signed the check and gave it to them.

You are not here to try the ethical situation. If you do, you violate your oath.

Mr. Ziegler is not here on a charge of ethics. He is here on a charge which says that they were overdrafts on the West Coast Supply Company account, and they weren't drawn on that account.

Your Honor, I notice I have spent about 30 minutes of my time. How long did you want to go? You mentioned a quarter of five.

The Court: You just regulate it, Mr. Carr, any way you find it convenient because you have a total of an hour and a half.

Mr. Carr: I don't know how the jury feels. I don't want to lose the patience of the jury, your Honor.

It is getting late, and if I am losing their patience, I [615] want to quit and continue in the morning. May I suggest that we had perhaps better defer the argument until the morning? However, I shall abide by your Honor's suggestion.

The Court: That will be satisfactory.

Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves or permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will *not* take a recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p.m. a recess was taken until 10:00 o'clock a.m., February 11, 1947.) [616]

Los Angeles, California, Tuesday, February 11, 1947
10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor.

(Brief interruption for other court matters.)

The Court: The next case?

The Clerk: No. 19,106 criminal, United States v. Paul J. Ziegler for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: Ready for the defendant.

The Court: Stipulate the jury are present, gentlemen?

Mr. Strong: So stipulate.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: You may proceed with your argument.

Mr. Carr: I believe I have an hour, Mr. Cross?

The Court: Mr. Cross?

The Clerk: Yes, your Honor. You have an hour and 27 minutes, Mr. Carr.

Mr. Carr: I think you are mistaken.

The Clerk: You consumed 33 minutes; so you would have—

Mr. Carr: You are thinking of Mr. Strong, I think.

The Court: Yes. [618]

Mr. Strong: I don't have that much either, your Honor.

The Court: I have a note that you have an hour left, Mr. Carr. From 4:15 to 4:50; you have consumed 35 minutes, according to my record.

Mr. Carr: I have an hour left?

The Court: Yes.

Mr. Carr: That is what I understood, your Honor.

The Court: Yes.

ARGUMENT ON BEHALF OF DEFENDANT

(Continued)

Mr. Carr: May it please the court, ladies and gentlemen of the jury, I probably feel this morning like a Ford that has been frozen up. The oil is a little bit hard, and it will be pretty difficult to get under way.

You know, it seems that it is the life of a lawyer whenever he gets into trial that every client he ever had has to have everything done at that time. And, of course, it is human nature that they feel that they should come first. So I come before you this morning slightly weak and weary.

Maybe I will generate a certain amount of steam as I go along. I suppose we have got it in us. The human race, as we get up and pitch into our task, we forget about our weariness and begin to really work.

Yesterday I was trying, among other things, to break down the specific charges and trying to impress you with the [619] fact that you were hereto try this defendant on specific charges, not some general charges.

In that connection, and before I take up again the specific charge, I want to impress upon you the necessity under our jury system of the individual judgment of each juror. Each and every one of you ladies and gentlemen is an individual with your own processes of thinking and your own stamina, your own character.

It may well be that you disagree on the interpretation of the facts, and I want to admonish you that you are supposed to stand on your position.

If you are firmly convinced of your position, I think the court will so instruct you, you should stand to that

position and not be guided in your deliberations by a desire to be with the majority. In other words, it is perfectly possible that in your deliberations you may arrive at a verdict of guilty by 12, or you may arrive at a verdict of not guilty by 12; or three of you may disagree. Of course, I think the court will instruct you that you should listen to your fellow jurors, not have a closed mind, but should have a mind resilient to the other jurors' reasoning.

If, after listening to that reasoning, you are still of an abiding conviction, you ought to show it by your verdict. In other words, do not give in to any majority idea.

Coming back to the information and referring for the moment [620] to Count One, which is representative, as I told you yesterday, of Counts Three, Five and Seven, with different checks, but the allegations being similar, you will recall that we dealt with the subject of willfulness; that there must be proof of willfulness.

A mistake in judgment, a mistake in interpretation of the law, a man should not be punished for that.

Now, the test is not whether you, under the circumstances, would have come to a different conclusion. The question is whether or not this particular defendant at the time he did these acts as charged he actually had in his mind he was completing a transaction that was not in violation of the law, the specific charge.

The next thing was the allegation that he issued a sugar ration check.

Respecting the sugar ration check, I am sure the court will instruct you that a sugar ration check is defined by the very ration order under which this charge is laid.

Paragraph 5 says: “ ‘Check’ means a sugar ration check in the form prescribed by the Office of Price Administration drawn by a depositor”

I repeat that: “. . . drawn by a depositor” and continuing:

“ . . . against his account”

I repeat that: “his account.” [621]

“ . . . and made payable to the account of a named person”

So one of the questions under the instructions of the court you are going to have to determine is whether or not this was a check in Counts One, Three, Five and Seven. Was this a check drawn on an account by a depositor on his account?

I submit that the evidence is pretty conclusive that the account was in the name of the West Coast Supply Company; that in order to be a check drawn on his account, it would have to be on the account of Paul J. Ziegler.

It is my argument and my contention that this was not a check drawn on the account of Paul J. Ziegler, and he was not a depositor.

The next allegation:

“ . . . for an amount larger than the balance in the account on which it was drawn”

Now, keep in mind, ladies and gentlemen, you have a specific charge; and this is the charge by which you must be guided in determining whether the proof has established a case.

Now, it says:

“ . . . for an amount larger than the balance in the account on which it was drawn”

Can any of you ladies and gentlemen say that when you write a check for a milk bill on an account in the Bank of America and it is on your own account that you are drafting the check [622] or drawing the check for an amount larger than the account if the account is in some other bank?

Here it says:

“ . . . larger than the balance in the account on which it was drawn . . . ”

Well, on what account was it drawn? It certainly was not drawn on the West Coast Supply account. That name was put in on those checks after those checks were issued. So the proof falls down again in regard to the specific allegations of Counts One, Three, Five and Seven.

The next allegation is:

“ . . . that less than the amount of outstanding checks drawn on that account . . . ”

We are now again talking about that account. As a matter of fact, it seems to me that it is just common sense that when Mr. Ziegler signed these checks he was in this position:

He says, “I don’t think OPA was in existence.” The broker said, “Well, we want checks.”

Now, suppose it had been meat rationing? Suppose the broker had said, “No, I can’t sell you meat.” And Mr. Ziegler knew that meat rationing had gone out and he said, “All right, if you insist. I think I am entitled to meat. I am going to sign this piece of paper and give it to you.”

What has he done? He has not drawn a check to get meat. He has merely complied with the whim of some-

one who is selling [623] the meat because meat rationing is entirely out of the fact.

The next allegation is:

“ . . . by issuing and causing to be issued to Union Sugar Company . . . a sugar ration check . . . ”

Well, I don't need to repeat my observations respecting a sugar ration check because a check is drawn by a depositor on his account. And this was certainly not—and the evidence does not show—on his account.

“ . . . was drawn by and on behalf of West Coast Supply Company and Paul J. Ziegler . . . ”

Now, “and on behalf of the West Coast Supply”: yet the evidence, to me, is conclusive that West Coast Supply Company was not on the check when it was issued, not on any one of those four checks.

How could it be drawn by and on behalf of the West Coast Supply Company?

It goes on to say:

“ . . . on the Union Bank and Trust Company . . . ” when West Coast had a balance in its account at said bank in an amount insufficient to cover the amount of the check.

This whole information shows that the Government started out to prove that this check was actually issued on the West Coast Supply Company account. It was under that specific section, 15.7 (d), which is labeled right at the top of the [624] count, which says:

“No check may be issued for an amount larger than the balance in the account on which it is drawn . . . ”

The Government started out here to prove that this was actually the check as it stood at the time; that “West

Coast Supply Co.” was on those checks and that this check was actually drawn on the West Coast Supply account.

It developed that that is not the case. I contend that the allegations of this information are thrown completely out of line with the proof. But you are to consider—and that is your prerogative and duty—whether or not the material allegations, as they are laid in this information, have been proved, not to speculate on whether or not these checks might violate some other of the many rules and regulations of this order or some other OPA order.

I submit that is just common sense because if a defendant, as I said yesterday, is to be brought into court charged with having hunted in violation of the law, shot doves and you prove when he gets on trial that he was guilty of drunk driving, we certainly would have chaos in our system of justice.

A defendant is entitled to come into court and meet the specific charges. We have met these charges as it developed that the Government is at least mistaken about these checks. In fact, from all of the evidence in this case I think it is conclusively shown that they were altered. The reason for the [625] alteration is not necessarily material, but the fact that they were altered brings into play this simple proposition that these checks were not issued by a depositor on his account and, in fact, they are nothing but pieces of paper just the same as if I gave you a check today for meat.

Insofar as intent is concerned, in this connection in this count I want to call your attention to Exhibit G,

Defendant's Exhibit G. This, you will recall, is the check from the OPA for 66,963 pounds of sugar, and it is dated June 28, 1946.

That was on a Friday, and I assume this check arrived sometime in the mail of the West Coast Supply Company on Monday or Tuesday or sometime after Sunday.

The reason this check is in evidence is very simple. Mr. Ziegler, or at least the West Coast Supply Company, had a certain balance in its account; and they also received this additional amount of sugar under the rationing program. The fact that the West Coast Supply Company did not deposit this check, to me, is very significant. Apparently someone must have thought that the check was just a piece of paper; that there was no rationing program on sugar still in effect and why make the deposit?

Here it is still here today. There was no deposit made. It seems to me that is simple reasoning.

Now, I want to take up Count Two. Before I do that I want to refer you to this, and I think the court will deal with [626] it—and, of course, you must take the law from his own Honor—the province of the jury being to determine facts. The province of the court, under our system, is to give you the law. You apply that law to the facts and reach your conclusion. You must be bound by the law as given you by the court. There is no question about that.

Now, the word "Issue": I left that word to come back to this information, Count One, again. It is said that this defendant issued a check.

I have submitted to you that proposition that there is in evidence that it was a ration check. The next thing is

paragraph (15) of Section 24.1 which defines the word "Issue," and I think it is very significant.

" 'Issue' when used with respect to a check, means the delivery of a completed check"

I repeat that:

". . . the delivery of a completed check to the person to whose account the check is made payable."

I submit to you that that allegation is not sustained; that the check was not a completed check when it was delivered. Therefore, it was not a check issued within the meaning of the law.

Now, please, let's don't arrive at the conclusion that I am being technical. Let us keep in mind that the specific charge is the charge that you must decide and not go off into [627] the field of speculation about other charges.

It may well be that this particular act or acts might be a violation of a hundred other sections of this order; but that is not your province. The Government has picked and chosen the particular charge on which it will stand, and it is up to the Government to prove beyond a reasonable doubt every material part of that charge. If the Government does not do it, your duty is to acquit this defendant.

Respecting other definitions, I think the court will instruct you that the OPA order provides what an "account" is, and that is, referring to Section 24.1, paragraph (1):

" 'Account' means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks"

" 'Depositor' means a person who has a ration bank account"

I submit to you that the evidence in this case is not or does not by the slightest prove that Paul J. Ziegler was a depositor or that he had a ration account. The best way I can focus the whole problem on Counts One, Three, Five and Seven is to use an analogy with checks.

If I sign a check "Charles Carr" and I have no account at the bank, I may be charged with issuing a worthless check. But if I am charged with overdrawing an account on the West Coast Supply Company and I never wrote "West Coast Supply [628] Company" on that check and the Government proceeds on the theory that they will prove that it is an overdraft and the facts develop that the check was issued by me on no particular account, it is merely a worthless check and the charge has not been proved, to-wit, that it was an overdraft.

Those are two separate violations. Under State Law you might be charged with issuing a worthless check, or you might be charged with an overdraft on a particular account. So that is a distinction I am continually trying to impress upon your minds: the specific charge—the specific charge—the specific charge, not some general proposition that he may have violated some rule or regulation.

Respecting Count Two, it is representative of Counts Four, Six and Eight in this: The allegations respecting the amount of sugar are different, but the allegations otherwise are the same. And, mind you—and keep this in mind—the Government picked its crime here.

The Court: Not a crime, a misdemeanor.

Mr. Carr: Very well, your Honor. That is, I believe, still a crime.

The Court: All right.

Mr. Carr: Remember yesterday I said to you that there might have been some doubt in somebody's mind. The Second Count starts out: "U. S. C., Title 50, Appendix, Sec. 633, et seq.; General Ration Order No. 8, . . . 2.9." [629]

So I suppose you know to get those equivocal situations in your mind they thought, "Now, let's see. Which way do we go here? Well, at any rate, Section 2.9 is the charge."

So we are here in court on a specific charge of violating, not this ration order but another ration order now. That is Ration Order No. 8.

Let us see what that specific charge is. Now, mind you, I am going into Counts Two, Four, Six and Eight so that these arguments relate to all of those counts.

It says:

"From on or about July 3, 1946, to on or about August 17, 1946 . . . defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, willfully and unlawfully performed an act provided by Section . . ."

And I notice 2.8 scratched out again, and 2.9 is left in.

". . . of General Ration Order No. 8, in that said defendants did willfully and unlawfully receive a rationed commodity . . . 380,000 pounds of sugar . . ."

Well, on the subject of a rationed commodity, I assume the court is going to instruct you that rationing was still in effect at that particular time. Our position has been to the reverse. We have contended differently here, but we have to submit to his Honor's ruling in that regard.

“ . . . from the Union Sugar Company, in exchange for a [630] ration document, to-wit, a sugar ration check . . . ”

You have to find beyond a reasonable doubt from the evidence, from this specific charge, that the sugar was received in exchange for a ration check.

Later on it has to do with invalidity. I will take that up in a moment.

Now, I have submitted the argument about what a check is; that it was not drawn by the West Coast Supply Company at all and that the proof does not show it was a ration check.

“ . . . drawn by and on behalf of the . . . West Coast Supply Company and Paul J. Ziegler . . . ”

I have submitted the argument, that same argument, I gave you on Count One, applying to this series of counts that it was not a check drawn by or on behalf of the West Coast Supply Company. It was nothing but a piece of paper.

Back to the meat proposition again, he did not believe rationing was in; so here is a piece of paper. It goes to the question of intent; but at least the charge is not sustained.

It goes on:

“ . . . in the amount of . . . 600,000 pounds of sugar, on the Union Bank . . . dated July 1, 1946, and issued by the defendants . . . ”

I have made my argument to you respecting the word “issue,” that is, as to the completed check. In other words, I submit [631] the evidence does not show it was a completed check.

“ . . . when . . . defendants knew and had reason to believe that the said ration document . . .” meaning the check—

“ . . . was not validly issued”

It was not a question of validity at all. I submit the evidence shows it was nothing but a piece of paper.

If the Government had wanted to charge this defendant with having received sugar without having turned over a ration document, that is another charge; and that is not the charge in this case. That is the trick of this thing that you are going to have to watch because I have debated this thing with myself over and over again, and I find I even get into confusion. I get to thinking, “Well, now, here there has been some proof about receiving sugar.”

The section here is 2.9 in connection with the issuance of a ration check. This is the section that provides that it is unlawful, for example, for a person to receive sugar without giving up ration evidences. But that is not the charge in Counts Two, Four, Six and Eight. And you will have to watch that, or you will be led into confusion and you will come to the conclusion, “Well, he received the sugar. He didn’t give up a ration certificate.”

If you intend to find him guilty, only if he violated the law will you find him guilty. But that is not the charge at [632] all.

So I beg of you to be very careful in analyzing the proof with relations to the allegations in those counts.

Then it goes on to say:

“ . . . because the said West Coast Supply Company did not have a sugar ration bank account in said

bank with a balance therein sufficient to cover the amount of said check."

That is a material allegation, I take it, of this information. Can you find this defendant guilty on this charge? From this evidence can you say that that allegation has been proved because "said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check?"

I submit the proof is that it was not drawn on the West Coast Supply Company account at all.

If the world were made up of theories such as advanced by counsel in the early part of this case, that all you have to do is form a partnership and have your partner go out and shoot someone or commit a crime and that you are going to be responsible because that partner heretofore has been acting for and on behalf of the partnership, you would not dare have a partnership.

Furthermore, there is a wide distinction, ladies and gentlemen, in business, as you all know, between being a partner of a concern and being authorized to sign a check. [633]

Let us assume, for the purpose of argument, that in accordance with Government's Exhibit 2, I believe it is, that signature card, that Mr. Paul Ziegler was authorized to sign a ration check but the signature card required that it have "West Coast Supply Company" on it.

As a matter of fact, you will recall that the proof showed that they had three accounts: Wholesale, Industrial and Processing. And on those checks, in addition to the name "West Coast Supply Co." appeared "Industrial" or "Wholesale."

So you don't even have a distinction as to which of the three accounts the check was even purported to have been drawn on. If you had the West Coast Supply Company name on there, you wouldn't have that. But a person who is authorized to sign your name is not authorized to go out and commit a crime, and by merely putting your name on that document make himself liable or you liable, insofar as issuing the check is concerned, because first of all the charge is that it was a ration check; it was issued on the account of the West Coast Supply Company.

I submit to you that you are going to have to be very careful about especially Counts Two, Four, Six and Eight because you may get off on the proposition, "Well, if he received the sugar and he didn't give up ration evidence, he is guilty."

Well, that is not the charge. And I keep repeating that: That is not the charge. You should make the proof fit and support the allegations of these counts. Otherwise, he is [634] entitled to an acquittal.

I have tried, in the best way I can, to break that down. It is to some extent legalistic. But I think I have made myself plain as to the specific charge.

Are the material allegations supported by the evidence in this case? And I submit to you that they are at complete variance with the proof—at complete variance.

Now I want to come back a moment to this question of intent, I dealt with it somewhat yesterday, but first I want to take up the matter of shipments. I don't think counsel for the Government will contend that whoever had received the sugar, be it the John H. Ziegler Company or the West Coast Supply Company—I don't

think counsel will contend that that sugar was received after July 12th. There are some documents here which purport to show the transfer of the sugar from the Overland Terminal Warehouse to the West Coast Supply Company. But on those dates the sugar had been paid for, had been delivered to the warehouse to the account of the West Coast Supply Company.

So I submit on the question of intent, which involves this document, involves this Executive Order 9745, that even if you find that the defendant Ziegler received that sugar, the sugar having been delivered on July 12th, that the evidence clearly supports the proposition at that time that Ziegler could well have intended not to violate this law because he [635] did not know anything about it.

Just let me recap the situation on this just for a moment.

Ziegler, the evidence shows, was looking for sugar in May and June when the OPA was supposedly being debated in Congress. He had told these brokers that he thought sugar rationing might die and if so he wanted to be in a position to get sugar so he could maintain his business.

He did not buy any sugar during that period. He waited until OPA, that is, the Price Control Act, actually died.

On a Monday morning, after the President made the speech in which he pointed out why he had to veto the extension of the Emergency Price Control Act, the very following morning bright and early Mr. Ziegler went out, got busy, called up the same brokers to get the sugar.

I submit to you in passing that that shows a definite intention not to violate the law, but he thought that he

had waited until rationing had gone out; that he intended to go out and do business as any businessman would do and that is go out in the market and get sugar to maintain his business. You will recall that the testimony was that his company was unable to get sugar.

That is very simply understood because under this ration order everybody is put up on an historical basis. If you did not get sugar at a certain time, after that time you were out [636] of luck.

This executive order was filed in Washington at 10:32 a.m. Monday morning. That is 7:32 a.m. out here. Let us have no quibbling about that. So it was filed with the Federal Register. It was published in this first issue of July 2, 1946, after these checks had been written.

The evidence shows this reached the United States Attorney's office on July 9th, and the evidence shows that sometime after that time I acquired this copy.

Here is a ration order. You have got to keep the historical background in mind. The Second War Powers Act was also dying, but the Congress extended that on Saturday, June 29th, and the President signed that bill.

But on the Price Control bill, he did not sign that.

It is very reasonable for a lawyer to believe, or anyone, for that matter, that if OPA is gone, these delegated powers under the Second War Powers Act which had gone into the OPA were no longer in the OPA because OPA was dead.

The President must have thought that, ladies and gentlemen, or else why this executive order?

Here is an executive order which says, mind you, in light of the fact that the bill has now been vetoed extending the OPA:

“The Office of Price Administration and the Price Administrator are directed to continue to exercise and [637] perform all those functions, powers, and duties vested in them under or pursuant to the Emergency Price Control Act of 1942, as amended, and the Stabilization Act of 1942, as amended, which do not terminate by reason of the termination of those Acts on June 30, 1946”

And what else does he say to OPA?

“. . . and all functions, powers, and duties delegated to them under or pursuant to Title III of the Second War Powers Act”

in other words, the President felt that OPA had no powers at that particular time. First of all, the Second War Powers Act has just been extended. OPA died. This delegation of power must be re-delegated to the OPA so that they may be in existence to carry out these many rules and regulations.

This was filed in Washington early that morning, and Ziegler that same morning is out here trying to get sugar.

I submit to you that you are being asked to convict a person who is in a legitimate business, who has watched for two or three months the sugar market waiting for an opportunity to buy upon the assumption that OPA was dying. And as soon as he thought it died, he went out and bought.

Well, just one more reference back, then, to the telegram. The Government seems to contend that because

the telegram was brought to his attention, or at least the witness testified, after, I suppose, refreshing his recollection, that this telegram [638] was read to Mr. Ziegler—it says:

“In view of extension Second War Powers Act rationing and allocating sugar and molasses continue in effect unchanged.”

This is signed by James H. Marshall, director of the Commodity something.

Well, Mr. Marshall and the President seemed to disagree on the proposition. The telegram is dated July 1, 1947. At least the witness said that is the date that it is supposed to have been received. I don't know what time of day.

But I submit the telegram is wholly inconsistent and that Mr. Ziegler, as a lawyer, as an individual, had a perfect right to be of the same opinion that the President had, and that was there had to be an executive order of some kind setting up and re-delegating this power.

I want to ask you now, How was Mr. Ziegler to know that this order had been filed in Washington, D. C.? As a matter of fact, I doubt if Mr. Strong knew about it until he started to work on this trial. He may have in connection with some other case.

Keeping in mind the specific charge, the necessity for proving specific willful intent, I want to advert again just a moment to this shipment business. I don't think I made it quite clear. I was dealing with it with reference to receiving the sugar on the 12th. The last shipment of sugar was received then. The fact is that Mr. Ziegler at that time did not know [639] about this proposition.

Now, the shipments of the sugar from the warehouse: in other words, if you buy eggs and they are put in the warehouse, the mere fact that you move those eggs from the warehouse to your home does not mean that you did not have the eggs before they moved them from the warehouse. So the dates after July 12th, I submit, are not material to the question of intent. In other words, these transfers of sugar from the warehouse to the West Coast Supply Company.

Time seems to go by. So. Mr. Cross, will you advise me on the time, please, sir?

The Clerk: Yes. Your time is up at 11:05, Mr. Carr. You have 20 minutes.

Mr. Carr: Very well. Now, the question was brought up about the advice of counsel. Unfortunately you cannot convict me in this case anyway. Maybe I should be the one; I don't know. But I think his Honor will instruct you—and I am frank to admit we lawyers make a lot of mistakes; in fact, I don't know anyone who doesn't make a mistake now and then. If I meet a fellow who says he doesn't make a mistake, I want to get away from him fast.

Mr. Ziegler testified that he came to his counsel at that time—it happened to be me—and as I remember back he had every other name in town suggested to him by the OPA except mine. But I got in the case some way. He got some advice [640] from someone who purports to be a lawyer, to-wit, the man who is now standing in front of you.

With all due respect to his Honor, with all due respect to the Government and with all due respect to the Administration and everyone concerned, I will still

bank my judgment that there was not any rationing at the time.

His Honor is going to probably instruct you—I think he will—that there was rationing at the time. That was my judgment. It is still my judgment. And you have got to take a little bit of the sting off of Mr. Ziegler and put it on my shoulders. My shoulders are usually pretty broad.

I believe I said earlier they are not too broad this morning, but I think they are broad enough to stand that. And I think his Honor will instruct you that if in laying all the facts before his counsel, honestly relying upon the counsel's interpretation of the law, even though it is inaccurate, and believing it, that that is a defense to be considered by you ladies and gentlemen of this jury.

I submit that the facts in this case are such that he is entitled to that consideration.

I want to advert just a moment to the proposition of a type of business. I think I have already mentioned that, and I may be repeating myself. But in a cause of this kind I suppose some things will bear repeating. We are not dealing here with some underhand black market situation. We are dealing [641] with an established concern that is trying to operate a legitimate business. It was not even selling sugar. I believe the testimony showed there was not even a single sale of sugar at that concern but it was used in the manufacture of products which are sold throughout this area.

He was in need of about 47,000 pounds of sugar a day to actually carry on his manufacturing business. And when he was out trying to purchase sugar, after he believed that OPA went out of existence, he was doing just the normal thing a business person would do.

And the amount of sugar again: please let me ask you, Don't let the figure 1,300,000 pounds influence you in this case.

Respecting the alteration proposition, I have got to advert to that again. I said yesterday something about cricket. Well, I think you know what I mean by "cricket." It means that when you play a game of polo instead of swinging the club back maybe under certain circumstances you give the other fellow just a sporting chance. Maybe while the bird is sitting, instead of shooting you let him fly before you shoot.

Well, Mr. Ziegler has never left the ground in this case. They started out with the proposition that the Government is going to prove that these checks were issued on West Coast Supply Company. They had four investigators go up there when Mr. Ziegler is supposed to have made that brilliant [642] assertion that he was going to get sugar anyway he could way back in February, '46. They had four men, I think, at that time. The A.T.U., the Food and Drug, and everyone but the Navy went out to the West Coast Supply Company to try to get a statement of some kind, and they certainly had the opportunity to find out the fact, if they didn't find out, that these checks had been altered. Yet in a court of justice where the sole aim and purpose of the administration of justice is to ascertain the truth, if my client is guilty of a violation of the law and you so find, it would be your duty to convict him. But, on the other hand, he should be convicted upon the light of the truth. And yet a witness takes the stand and testifies on direct examination that those checks are in the same condition now. If the first witness did this, would that not put someone on notice it might have happened to

the other three? They put the second witness on. No attempt was made to get at the light of truth. I had to struggle and fight my brains out here to try to get at the facts to establish that these checks were altered.

All right, if Mr. Ziegler has violated some other law, let us get at the facts in that case and let us convict him on a specific charge, on the truthful specific charge. It might have been that if I had been incompetent—maybe I was in not getting more evidence out—I might have failed completely to bring out from those witnesses the fact that [643] these checks had been changed. But afterwards finally the situation develops, and it becomes quite obvious that there has been a change. Even two more witnesses take the stand and testify. Do you recall the fellow? I said, "Are you positive that that check was not changed?" And he answered, "Absolutely."

Yet the Government does not assume the burden to clarify that situation and find out the truth. We might have gone through this trial without the truth ever being developed, except what the defendant might have testified to. And after all you might disbelieve the defendant. This whole case might have gone to the jury on the proposition that these checks were actually issued on the West Coast Supply Company account. That is what I mean when I refer to "cricket."

Mr. Strong, I realize, is a lawyer. I am not maligning his character. I know Mr. Strong very well. I know his great traits; and maybe if he has any bad ones, I may know some of those. He probably knows the same about me. But Mr. Strong is like so many weak human beings. We go out to play tennis. We want to win. It just gets in the blood. We want to win. And we are blinded with our desire to win.

I submit to you that the light of day should always come out first by the Government on a situation of this kind.

May I have just one moment, your Honor?

(Brief pause in the proceedings.) [644]

Mr. Carr: Ladies and gentlemen, I have, in the best way I know how, tried to boil this case down to the crucial issues. I have tried to appeal to reason, and I am expecting you, as good American citizens, to base your judgment and your verdict on reasoning.

I admonish you again: the specific charge! And I want to leave these two thoughts with you.

Here is a misdemeanor or crime—call it what you will—which has been committed in broad daylight. Checks have been issued through the ordinary course of business. A concern needs sugar.

The evidence, I believe, shows that it was in desperate circumstances in May and June. Mr. Ziegler, had he wanted to violate the law that badly, it seems to me would have violated it in May and June. But he goes out in the open market. He does not hide anything. He issues checks in the ordinary course of business. The sugar is delivered in the ordinary course of business, and it is used in a legitimate enterprise. The concern needs, I believe he testified, 47,000 pounds of sugar a day.

Would you not think that a lawyer, if he really intended to violate the law and thought he was violating the law, would at least take the pains to cover up something? Would he just go right out in the open broad daylight and do all of these things? [645]

Well, I submit to you that the proof is inconsistent with the theory that he was actually out deliberately and willfully violating the OPA.

I request you again, in your consideration of this case, to resort to your individual judgment, keeping in mind that you sit—and these are not trite words—in a period of time after much *travail*, not only recent but in years past. Many of your forefathers gave up their lives to found the system where free men could be tried in a free way. Sometimes we forget those sacrifices, and in our casual every-day approach to life we get in a hurry; and we get wound up and wrought up over our own affairs and we forget a little bit about the other fellow.

But the sacred rights—and they are indeed sacred—which were founded in the blood of your forebearers gave you the privilege of sitting on that jury and me the privilege of addressing you and also the privilege that his Honor has of sitting there to instruct you in the law. That sacred privilege requires the utmost confidence, care and nurturing to be sustained by you, so that when you take this case—I am about to relieve myself of what responsibility I have in the matter at this time; and I have resorted to that responsibility the best I know how—but you are about to take over that sacred function of deciding what shall happen to one of your fellow men. No matter what his station or rank, creed or color, [646] a man in a court of justice in a democracy is entitled to the closest scrutiny and consideration of each and every one of you.

And when you go home—I will say this to you—and if you convict this defendant without an abiding conviction beyond a reasonable doubt, you yourself may recall if you were careless or inconsistent or did not give a thought because it will rest in your bosom, your conscience, What have I done? And is it in accordance with

those great principles that have been established on the blood of your forebears?

I am not trying to say this to wave the flag to you. But sometimes we, the American public I am afraid, develop the point of view that a trial is like a baseball game. It is the matching of wits of counsel. We have had so many trials in the movies where people leap up and make wild assertions and argue with the witness. I am afraid we have a tendency sometimes to get away from the sanctity of what you people must do in a case of this kind.

I say to you that this defendant is entitled to the same kind of judgment that you would expect from your own mother or your own father, from your own brother, from your own fellow citizens, just as much care and tenderness in deciding these issues, because if he is not guilty the system is set up to free him under a free system. And if he is guilty, he should be convicted only upon the specific charge under the evidence [647] proving every material allegation of that charge.

You look like good, straightforward American people to me; and I am at this time willing to submit it to you. I am not asking you to bring in any particular type of verdict.

I am just asking you to do this: require the Government to prove the specific charge; make them prove beyond a reasonable doubt the specific charge. If there is a material allegation that is left out, you should acquit. If they do not prove willful intent beyond a reasonable doubt, you should acquit. And you should not speculate upon any other issue, moral, ethical, or upon whether or not this defendant has violated some other law. So that you

may have that feeling that you have contributed in a small way to an, indeed, great system.

I say this to you very frankly from a great many years' experience from a relatively young man that the sanctity of democracy, its cornerstones, must rest upon justice in the courts. If we ever lose or fail in bringing justice in our courts of justice, I predict the beginning of the crumbling of a great democracy because here is where men and women and all may come for an unbiased, impartial decision of whether or not a particular person has violated a specific law.

So I leave it to you. I pass that responsibility which has been mine under this free system, and I now give it to you.

I say this in closing: If I have offended you in any [648] way, that is of no moment. If you don't like the texture of my skin, the color of my hair, that has not nothing to do with the case. Maybe you don't like my looks. That has got nothing to do with the case. Maybe one of you might not like Mr. Strong, although it doesn't seem possible because he is a very charming, affable, aggressive,—and I repeat aggressive—fellow.

Don't let the lawyers bamboozle you in any way. Don't let me, and I know Mr. Strong wouldn't. But just decide this case on your God-given right as a free American citizen to determine whether or not they have proven the specific charge.

I want to thank you for your courteous attention. I don't know whether you agree with me or whether you disagree with me. I have been practicing law a little over 20 years, and I am frank to say I can look you ladies

right in the face, and I am just one of those gentlemen who doesn't know what a lady thinks. As a matter of fact, I can look you men in the face, and I don't know what you are thinking.

A great many people tell me that you can read the mind of the other person, but I am frank to say that when I leave this platform I don't know what you are thinking. But I am indeed grateful that you have looked me in the eye, given me a straightforward hearing. That is what I am entitled to, and I have had it. My client has had it, for which I thank.

The Court: We will take our morning recess, ladies and [649] gentlemen. You will remember the admonition I have heretofore given you. You will not discuss the matter among yourselves or permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take our morning recess.

(Brief recess.)

The Court: Stipulate the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Mr. Strong, you may proceed.

CLOSING ARGUMENT ON BEHALF OF THE
GOVERNMENT

Mr. Strong: Thank you, your Honor. Ladies and gentlemen of the jury, I am tired, too. I guess we are all tired here. So I shall try to make as brief as I possibly can what I have to say.

There is one thing which Mr. Carr said with which I agree completely. That is the necessity of preserving these fundamental bases upon which the democracy in which we live is founded. There is no question about that. Nobody disagrees. [650] But there is one basis that has not been mentioned, and that is obedience to the laws of the United States.

How long, ladies and gentlemen, do you think this country can continue if people can disregard laws as they see fit? How long can they continue if people decide for themselves what laws to obey and what laws not to obey? That is one of the most fundamental bases for continuance of any system of Government including this one. And there isn't any question as to the law in this case.

His Honor will tell you what the law is. If there was not any rationing in effect at the time that we charge, you would not be here. There would not be any case here. But his Honor will go into that in a little more detail.

As you have noticed, I am the prosecutor in this case. I have a duty to perform. My duty is to bring in cases and to present them before a judge and a jury. You ladies and gentlemen are the ones who determine whether there is a violation or not. I have no personal interest in any of these cases, except insofar as is necessary for

me to perform my duty to the greatest and fullest possible extent.

If I seem aggressive or if I do anything else, it is only because of the necessity of performing my duty in the best way that I see fit. And my purpose is not to convict anyone or to persuade you in any way against the facts. My purpose is simply to present the facts to you, and you decide what the [651] facts show.

You know, in connection with these cases, that there are various agencies coming into play. You saw agents from the Office of Price Administration.

They have a function to perform that is separate from mine. And the A.T.U. people, they have a function to perform and I have nothing to do with the performance of their function. They have nothing to do with the performance of mine.

My job is to bring the evidence before you the best way I possibly can, and my job is to bring the evidence before you which is put before me in a form that I consider to be credible.

What better basis if there for me to present evidence to you than to put a man on the stand under oath? If he gives evidence under oath, I assume he is telling the truth. If on cross examination some other story is brought out, that is something else. I don't know what the truth is at that point. You will have to decide which of the stories to believe if they are in conflict. That is the function of the jury.

Now, these laws which we have in this country apply to everybody equally, including Mr. Ziegler.

Ladies and gentlemen, if upon examining all the evidence in this case you may decide that he did not violate

the law, by all means you should acquit him. There is no question about that. If you have any reasonable doubt about the facts which [652] his Honor will tell you about in giving you the instructions on the law, if you have any reasonable doubt you should acquit him. There isn't any question about that. His Honor will state the rules that you said you would follow, and I know you will follow; there is no question as to that, either. And in applying those rules, if you decide that the defendant was not guilty as charged, acquit him. Acquit him. But if, on the other hand, you feel that he is guilty as charged, it is equally your duty to convict.

I merely bring these different situations before you to emphasize, to dramatize the fact that you are the judges; and you decide, and that you have a duty to, as Mr. Carr said. And his Honor will give you the rules that you follow. It is as simple as all that.

I do not ask you to convict a person if you have any reasonable doubt as to his guilt. If you have any such reasonable doubt, you should acquit. But if you have no reasonable doubt, as his Honor will tell you, then you should convict. That is all there is to it.

In going over this part of my argument you can see that it has to be rambling to a great extent because I am going to try to answer some of the things which Mr. Carr said and bring some other material to your notice in connection with what Mr. Carr has said.

First of all I want to call your attention to this: As I [653] sat and listened to Mr. Carr yesterday discuss what is and what is not cricket, what I did that I should have done or maybe didn't do something else, I heard him tell you about Mr. Loud, Mr. Barry and the others. After a while I was sort of confused. I began to wonder,

"Well, who is the defendant in this case, anyway? Who is being tried here? My impression always was that Paul Ziegler is the defendant in this case and that if the evidence proves beyond a reasonable doubt that Paul Ziegler is guilty, that is the only question before you ladies and gentlemen."

But I heard so much about what is cricket and what is not cricket, as I say I didn't quite know. Possibly I am on trial here. But, of course, I am not, nor are my acts.

That is a method that is a very simple one. I think it is used very often: divert the attention of the people from the facts on which they are concentrating. Let them look at something else. Don't look at Mr. Ziegler. Look at Mr. Strong. He is not cricket. Look at Mr. Loud. Look at Mr. Barry. Look at anybody you please but not Mr. Ziegler. Concentrate on what Mr. Strong did or didn't do.

That has nothing to do with this case, ladies and gentlemen. If on the evidence which is before you now you feel that the defendant is guilty, that is one thing. If you feel that he is not, that is something else.

Now, let us take up these specific things because I don't [654] usually like to leave unanswered various charges of a type which might indicate that I am not trying to bring before you the whole truth. I said that is my job to bring before you the whole truth. Mr. Carr said something about my amending the information. I amended the information, yes. That is permissible. It is a practice that can be followed. If it were not permissible, his Honor would not have allowed it. I am authorized to amend the information, and you are now considering the case on the basis of the amended informa-

tion. It does not make any difference what it was before that time.

The charges as they now stand are the charges in the amended information which his Honor read to you. Those are the charges. And as to why I amended it, that has nothing to do with this case.

As I say, it is my job to present the case; and if I feel, in the performance of my duty, that I should amend an information, I shall do it if the court permits me to. If the court does not allow it, then, of course, I don't amend it.

In this case the court allowed it. The information is amended. We are proceeding on the amended information. There is no secret as to that at all. Then there was some question raised as to why Mr. Ziegler was named a partner when the evidence shows that he was not a partner.

Let me ask you, ladies and gentlemen, supposing you were proceeding in preparing a case and you obtained documents from [655] an official Government agency on which the person whose case you were considering had signed his name and then as his title wrote "partner, West Coast Supply Co.," do you think you would be reasonable in assuming that when he did that that he was telling the truth that he is a partner in the West Coast Supply Company?

Frankly I still don't know whether he is or is not because, as I have shown you, these forms which are in evidence he wrote in his own hand that he is a partner, and then on the stand he says he is not.

I don't see any reason for believing him any more readily on the stand than believing what he said before; and I don't know whether he is or is not a partner. But

that does not make any difference at this stage of the case because, as his Honor informed you, the West Coast Supply Company is no longer in this case and that the issue of his partnership or whether he is a partner has nothing to do with the present status of the case. There is only one defendant here, and that defendant is Paul J. Ziegler.

Then Mr. Carr brought out something about the fact that I, as Government counsel, did not introduce certain registration forms which purport to show who are the partners.

Again, there are several reasons for that; and I am only explaining this to you now because Mr. Carr made something of it. [656]

The first reason is that we have two conflicting sets of forms. Here is one set of forms about which Mr. Carr talked which purport to set out who were the partners. But on the other hand we have the signature of Paul J. Ziegler on another form on which he says he is a partner.

I still don't know whether he is a partner or not.

The second reason is a much more sound one in this case, that these forms are dated 1942 and 1943. Supposing he was not a partner in '42 and '43, and in 1945 he files a form that says he is a partner? I am not interested in what happened in 1942 or '43. We are interested in exactly what happened in July, 1946, to be precise.

Some of this evidence as to these forms in 1945 was allowed by his Honor into the case to help you determine what was going on in July, 1946. And if you need any explanation as to why I did not introduce them, that is it. I don't go back to 1942 and '43 when I have so much better evidence in the form of a document filed by the defendant himself in 1945.

As you remember, Mr. Carr discussed the fact that Mr. Loud testified that the defendant said to him he was going to get sugar, or words to that effect. Mr. Carr said that was incredible. People just don't do things like that.

Don't they? Don't they? Have you never heard of people bragging about what they are doing and telling in advance? Have you never heard of people going out and telling the whole [657] story of what they are going to do in advance? Doesn't that happen?

That happens time and again, ladies and gentlemen. A lot of people are arrogant. A lot of them are braggarts. A lot of them have this I-don't-care attitude.

There are various reasons why they do it. I am not a psychologist. I cannot analyze their reasons. But the fact remains that it is common experience that they do it. They do it time and again.

As a matter of fact, in this case we have much more convincing proof that it was done because the thing that Mr. Loud said Mr. Ziegler had told him he was going to do, to try to get sugar any way he could, isn't that exactly what he did in this case? Isn't that exactly what he was trying to do throughout May and June, 1946? And isn't that precisely what he ultimately did when he issued these documents over which there is a dispute, apparently, as to whether they are pieces of paper or checks?

Why did he issue these documents if it was not to get sugar? Was he not trying to get sugar all the time? Wasn't he trying to get it any way he could? And isn't that exactly what Mr. Loud said the defendant told him he was going to do?

I don't see any reason why it should be assumed that Mr. Loud is not telling the truth in view of all those circumstances and in view of the fact that Mr. Loud is a person who [658] has no direct interest in this case.

This is all part of the process that was gone through here yesterday afternoon of drawing your attention away from the defendant to somebody else. Something was brought up about Barry. Mr. Barry first testified that the checks came to him as they were. There was only one check. That came to him as it was, as it now appears.

On cross examination Mr. Carr refreshed his recollection, and Mr. Barry was not reluctant to admit as to what happened. He remembered then what happened, yes. And he told you the truth as to what happened. Then he recalled it.

You will remember that he told you that he wanted to know about this check, and he called up Paul Ziegler and Paul Ziegler was the one who gave Mr. Barry authority to fill in the words "West Coast Supply Company."

You will recall that testimony. And again, as I said yesterday, if my recollection is not exactly as yours, it is yours that counts. I am doing what I can to stay as close as I can, but sometimes it is hard to remember the exact words. So that this business of not cricket and not introducing this and not introducing that, and "what about Loud? What about Barry?"

It is the same sort of thing that is used to distract attention. You know about it yourself in your everyday lives.

I ask you ladies and gentlemen to keep one thing in mind: [659] that° what we are here to do is what Mr. Carr said at one part, to try the defendant on these particular charges.

If you have any mistaken impression that I am asking you to consider these acts on any other charges, remove that from your mind. I am not asking you anything of the sort. These are the charges that govern, and these are the charges on which the Government proceeds. These are the charges on which the Government has offered the proof, and these are the charges that the Government contends it has proved beyond a reasonable doubt.

I shall go into that in a few minutes. I shall show you how again.

We are not going off on a tangent or asking you to find anything else. And his Honor will instruct you in great detail on that. There will be no problem on it at all.

You have heard a lot here this morning, as well as last night, from Mr. Carr; and you have heard a lot from the defendant on the stand as to the checks being issued in a certain way and as to what the word "issue" means, as to what the word "depositor" means, as to what various other words mean.

As I gather it, the sum and substance of all those discussions, all those statements, is that he cannot be guilty because he did not do it according to Hoyle, which reminds me of something I heard the other day which I think best exemplifies my answer to that situation. [660]

I had heard of somewhere a person who had been driving at about 50 or 60 miles an hour in disregard of the local ordinances and happened to hit someone and kill him. He was immediately surrounded by police and others. He was placed under arrest. The driver was very indignant. He said, "Why are you holding me here? What have I done?"

They said, "You have killed a person with your car."

"Why," he says, "You can't hold me on that. I haven't even got a driver's license."

That is the sum and substance of the argument the defendant makes. He did not issue these checks according to Hoyle, according to the regulations. So you can't hold him for the crime with which he is charged.

But I will show you, as you will find upon listening to his Honor's instructions, that that is not at all as clear as Mr. Carr says. I shall attempt to show you that these checks were issued according to Hoyle; that the defendant is the person responsible for the issuance of those checks; that the defendant did know that there was not sufficient balance in the account of the West Coast Supply Company to cover those checks and that subsequently he took the sugar, although he knew that it was bought and that it was delivered upon the basis of a check for which there was not sufficient balance.

Before I go into that phase of it, I should like to point this out: [661]

Mr. Carr has pointed out to you what he says is some conflict between the telegram and the Executive Order. There is no conflict, ladies and gentlemen. That is none at all.

If you will examine those two documents, you will recall what was said about that. You will find that the Executive Order continues the Office of Price Administration for the purpose of continuing to administer the rationing laws; that the rationing laws did not end. They continued in effect. They were under the Second War Powers Act.

If you will recall the telegram, you will recall that that is exactly what the sugar company was saying, or who-

ever wrote the telegram: "the rationing laws will continue in effect."

There was no difference. And if there was a difference, it would not make the slightest bit of difference in this case because we are not charging the defendant with understanding or not understanding a particular telegram. We are charging him with having acted in violation of a specific law. And knowledge of the law is not material here. Ignorance of the law is no excuse, no more excuse today than it ever was.

You cannot violate laws and then plead as a complete defense that you didn't know about them.

You listen to his Honor's instructions. You will find out about that in more detail.

Mr. Carr said to you that he has broad shoulders and you ought to take into account and consider that his client acted [662] after consulting Mr. Carr.

Did he? Mr. Carr told you that his client consulted him somewhere around July 12th. You will remember that. But his client acted on July 1st. Mr. Carr was not consulted until at least 10 days after his client committed these acts. So how could his client have been guided by the advice of his attorney whom he did not see until 10 days later?

It is a physical impossibility, and he simply was not guided by any advice of Mr. Carr. He did not see Mr. Carr until 12 days later. And seeing him was after the act was complete.

I don't know what they discussed; but they certainly were not discussing whether his client should do that very thing which he did because his client had already done it. He had done it on July 1st.

As far as the sugar being received, I think Mr. Carr himself stated that all the sugar was received before July 12th and that his client did not see him until after July 12th.

How could his client be getting advice as to the receipt of the sugar from the attorney if he does not see his attorney until after he gets the sugar? There is absolutely nothing to it.

Without going into all the other matters which Mr. Carr has brought out, most of which are covered by the instructions which his Honor will give you, there you will see the accurate [663] and correct and full statement of the law. That is the law upon which the Government relies. That is the law that the Government says was violated by these acts. You will hear that statement from his Honor.

However, I should like to take up for a moment just the bare outline again since there has been so much talk yesterday afternoon and today about various other things. I should like to point out for your attention again the bare outlines of this case.

First I want to state to you again that the Government is only charging the violation which is contained in the counts of the information. We are not charging any other violation. If you find beyond a reasonable doubt that the defendant violated the law as charged in these counts, then you will find him guilty.

As to what he did otherwise, that has nothing to do with this case. These are the counts. These are the counts on which we stand. We do not waiver from them. We do not want you to consider anything else except these counts in the information.

These counts in the information, as Mr. Carr has pointed out and as I have pointed out, split up evenly into two portions. Counts One, Three, Five and Seven deal with the issuance of ration checks.

Now, we say, of course, that these are ration checks, although the defendant says they are pieces of paper. We say that these are ration checks, and these are the documents about [664] which we are talking.

How much more time do I have?

The Clerk: Your time is up at 12:22.

Mr. Strong: Thank you. So that counsel deals with the check for 600,000 pounds issued to the Union Sugar Company. That check, as you will remember, went through. It was charged against the account of the West Coast Supply Company at the bank; and, as you will remember, the testimony of the official of the bank when the check came in, he called up Paul Ziegler and pointed out that the account was way overdrawn when this check came in; that he did not get to talk to Mr. Ziegler one day. Then he talked to him two or three days later, and Mr. Ziegler, in effect, told him to post it as an overdraft.

Now, just diverting for a minute, if Mr. Ziegler did not intend to issue this check against the account of the West Coast Supply Company, why did he tell the bank to post it as an overdraft against that account?

Why did he not say to the bank official, "Why, I don't know what you are talking about. There is no check issued for 600,000 pounds against the West Coast Supply Company. You can't charge any such check against that account."

Did Mr. Ziegler say anything like that? He said, "Post it as an overdraft."

That, in substance, is what he told him. That was what was done. [665]

This check relates to Count One. Count One charges, in substance, that the defendant in this case only—Paul Ziegler now—“willfully and unlawfully issued and caused to be issued . . .”

It doesn't only say that he issued himself. It says “. . . caused to be issued . . .”

Remember that. That is important.

“. . . a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Union Sugar Company . . .”

That is what it says on the check, to the Union Sugar Company.

“. . . a sugar ration check . . .”

I say to you that this is a sugar ration check.

“. . . drawn by and on behalf of . . .”

It doesn't just only say “drawn by.” It says “drawn by and on behalf of.” Then it goes on to discuss the details of this check.

You have heard a lot of discussion here as to who put the words “West Coast Supply Co.” on there.

I say to you ladies and gentlemen it doesn't make the slightest bit of difference who put the words “West Coast Supply Co.” on any of those four checks. [666]

First of all, Mr. Carr in his argument treats these four checks as though it is conclusively established that they all went out of Paul Ziegler's hands without the words “West Coast Supply Co.”

I don't remember that it is conclusively established in that respect. My recollection is that at least two of these witnesses who received these checks testified that the check arrived exactly as it appears today—in other words, with the words "West Coast Supply Co." right on the face of the checks.

Mr. Carr: I submit that is not the evidence, and I ask your Honor to ask counsel to stick to the evidence because that is a very crucial part of this case.

The Court: Ladies and gentlemen, you are the sole judges of the evidence in the case. The attorneys may disagree on its interpretation, but you alone are to find the facts; and if you find that either side has misrepresented the facts, you will be governed by your own recollection of the facts.

Mr. Strong: You will remember Mr. Neff, the young fellow. I don't remember what sugar company he was with. But you will remember he was the one who testified about one of these sugar checks.

He testified that the check was received as it now appears.

You will remember Mr. Smith. Do you remember I had four witnesses here in connection with the checks? One was Mr. Leland. One was Mr. Barry. One was Mr. Neff and one was Mr. [667] Smith.

Mr. Neff, as I recall it—and if you recall otherwise, you, of course, are governed by your recollection—testified that the check, as it now appears with the words "West Coast Supply Co." was the way they received it. In other words, it was on there when they got it.

Mr. Smith testified that the words "West Coast Supply Co." were on that check at the time that they received it.

Mr. Barry at first testified that the words were on it. Then on cross examination by Mr. Carr you will remember he remembered what happened more definitely: that he called up Mr. Ziegler, told him he would have to return the check because it did not have the name of the account and that after some conversation Mr. Ziegler authorized the addition of the name "West Coast Supply Company" on that check.

Only one person—Mr. Leland—testified that that name "West Coast Supply Co." definitely was not on the check and he did not know when it got on there.

Now, that is my recollection of the testimony. Of course, Mr. Ziegler testified that on none of these checks was the name inserted. There you have the problem of whom you are going to believe.

Are you going to believe Mr. Neff and Mr. Smith? Or are you going to believe Mr. Ziegler? That is something entirely within your province. [668]

Let us assume for a moment that you believe Mr. Ziegler. Does that help him any? The answer is No, because I say to you, as I am sure the evidence shows, that the purpose of issuing these documents by Mr. Ziegler, with or without that name "West Coast Supply Co.", was so that he could get the sugar that he was buying.

He testified that they wanted ration checks and that is why he did it; that he issued these papers, but to him they weren't ration checks.

Maybe to him they were not ration checks, but to the law they were ration checks. And those people did not want to sell him any sugar without checks. He issued them to be used as sugar ration checks to cover the purchase of that sugar.

He was not issuing these for no purpose at all. It was part of the transaction to get sugar.

His Honor will instruct you, I believe, that it is not necessary for the defendant to commit every act himself: that if you believe beyond a reasonable doubt that he acted through an agent or through some other person and that that agent or other person acted with the defendant's knowledge and that the defendant accepted the benefit of that transaction, that is just as good as if he did it himself.

You listen for that instruction. His Honor will instruct you on the law.

Also, that the defendant is just as much responsible as if [669] he did it himself.

Now, I ask you, ladies and gentlemen, in all reason, do you think that this defendant issued these four documents, not knowing that that name "West Coast Supply Co." had to be used in connection with these documents to make them valid?

Do you think this defendant issued these four documents not knowing that possibly somebody might think it was an oversight on his part and that he would insert that "West Coast Supply Co." name?

In two cases the people testified flatly that these documents came complete with the name.

In one case you will recall one person, Mr. Barry, testified that the defendant specifically authorized them to add the name.

As to the third check, the name got on there; but I submit to you that that is exactly what the defendant intended to happen. He had no other sugar ration account on which to draw. He had none under his name. He had none under the name of the John H. Ziegler Company.

The only account that the defendant's signature could possibly draw any ration credit out of on sugar was the account of the West Coast Supply Company. This defendant had been dealing with all these four sales agents, these brokers, for a long period of time.

In his dealings they knew him as representing the West [670] Coast Supply Company. The sale was made to the West Coast Supply Company.

Do you think this defendant did not know what he was doing when he left off the name?

Let us assume it is true what he says. Do you think he did not know what he was doing when he left off that name? Do you think he did not intend to have somebody else put it in there?

I think he intended exactly what the evidence demonstrated. Of course, what I believe or what I think is immaterial here. You must convince yourself from the evidence—and the evidence alone—but I think that that evidence demonstrates the entire attitude of the defendant, what he was trying to do all the time, the mere fact that he issued four checks and deliberately omitted those words.

You might sometimes issue one check and accidentally omit some words, but he did four.

Would you say that the evidence does not show a deliberate scheme on his part, a plan on his part, to have the very things happen which he says happened here, that somebody entered those names?

Even if you believe his story, it does not help him in the least.

So I think with these checks in evidence and with the testimony concerning these checks the Government has established [671] Counts One, Three, Five and Seven for

each of these checks; and each of these counts charges that a check was willfully issued for an amount larger than there was in the bank, and it charges that he issued or caused to be issued a check drawn "by and on behalf of"

I think the testimony of these witnesses clearly shows that in some instances the defendant issued these checks as they are, and in other instances where he says he did not—and one of the witnesses said somebody else added it—that the defendant intended that that name be added and thereby he caused that check to be issued in that way.

That is exactly what he was doing. There is no difference than standing behind somebody and guiding his hand while he signs a piece of paper. That is what the guider intends to be done. That is why he has got his hand on the wrist and he is moving it around.

I do not think in this case it is any different, even though he may be miles away from the one who adds it. That is what he intended should be done. That is what I believe he thereby caused to be done.

Mr. Carr: At this time, your Honor, I am going to find it necessary to object to the persistent statement of the theory of the case, misleading the jury on the charge involved in the case, so that I won't have to make any further objection.

I just want the record to disclose a persistent course [672] throughout this argument in trying to lead the jury to believe about some charge that is not involved in the case.

The Court: Ladies and gentlemen, you are the sole judges of the facts in the case. Attorneys may disagree as to their interpretation, but you are the sole judges of the facts.

While a United States Judge may comment on the facts properly, I have not done so and shall not comment on them. That is why you were brought here as jurors, and I am sure that you will go over the evidence carefully and determine what are the facts.

Proceed.

Mr. Strong: Again I want to tell you, as I have said before, I am only asking you to look to the information and to be guided by what it charges. I am talking about no other offense. I have no intention of talking about any other offense. These are the only offenses I am talking about, the ones in the information.

Counts One, Three, Five and Seven of the information charge that the defendant issued and caused to be issued—those are the words—willfully issued and caused to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued, in the first count, to the Union Sugar Company a sugar ration check drawn by and on behalf of the defendant for 600,000 pounds.

Count Three of the information has the same language, the same words, except that it is a different check. It is a check for 30,000 pounds to the Spreckels Sugar Company, 30,000 pounds.

Count Five of the information has the same words, only a different check, 660,000 pounds to the Holly Sugar Company.

And Count Seven of the information has the same words as the other four, only it deals with the check for 80,000 pounds to the C. & H. Sugar Company. This is the check (indicating).

You will remember, ladies and gentlemen, that the defendant testified that he paid for the sugar; that he paid for it by check. And the checks are in evidence. The checks of the John H. Ziegler Company are in evidence.

As to four of these checks they are issued directly to the sellers of the sugar. You will find in the upper left-hand corner it says "In payment of the following—Date—Items—Amount" and stamped in "West Coast Supply Co."

I say to you ladies and gentlemen again that I am not interested in how the defendant and his brothers worked their internal operations. That has nothing to do with this charge.

The charges are of two types: the issuance of the checks and the receipt of the sugar.

The issuance of the checks is simple in itself. The receipt of the sugar: the defendant admitted that the John H. Ziegler Company has the sugar and that he is a partner. [674]

Well, let us see Count Two.

Count Two charges that the defendant willfully and unlawfully received a rationed commodity, 380,000 pounds of sugar, from the Union Sugar Company in exchange for a ration document, to-wit, a sugar ration check drawn by or on behalf of the defendant. That is the same check we are talking about in count one, I believe.

He admits that he got the sugar. There is no question as to the fact that there was not enough balance in the account to cover it. So the whole thing relates to this "West Coast Supply Company": who put it on?

Whether the defendant caused it to be put on or put it on himself, that is, as I said when I told you that little

story, the same as the man who got out of the car and says, "you can't arrest me for running somebody down because I haven't even got a license to drive."

Count Four deals with sugar received in exchange for the 30,000-pound check. He admits that he got the sugar.

Count Six deals with 660,000 pounds in return for that 660,000-pound check.

Count Seven deals with the 80,000 pounds.

What do we have in this case really as far as the facts are concerned? Checks were issued. There was not enough balance for any of those checks. Sugar was received on the basis of those checks. [675]

If there was not enough balance and the defendant unlawfully issued these checks, willfully did so; if he knew that there was not enough balance, then when he took that sugar he took it knowing it was in exchange for a ration check which had insufficient balance.

I think the Government's case is completely proved. I don't think there is any question as to that on these facts.

The only point that remains that I think I ought to talk about to you for a minute is this question of willfulness.

Oh, yes. I forgot to bring out this time as I did last time that the defendant was one of the authorized signatures.

When you listen to the instructions on who is a "depositor," about which Mr. Carr told you, you will find out that a person who is acting as an agent for a person who has an account is also regarded as a depositor. You listen to those instructions.

Certainly Mr. Ziegler has an authorized signature on that account was clearly an agent if he was not a principal. There is not problem as to the depositors or anything else in this case so far as I can see.

Now, the one thing that I want to talk to you about for a minute is this business of willfulness.

Ignorance of the law is no excuse. Whether you know about the existence of the law or you don't know about the existence of the law, if you willfully commit the act which is in violation of the law, you have violated the law as charged. [676] The mere fact that you did not know what the law said is immaterial. His Honor will instruct you on that. His Honor will give you a definition of what "willfully" means. You listen to that because that is the law that will govern you. Mistake as to what the law is is no excuse either. Everybody is presumed to know the law, and except insofar as requiring that he act wilfully in the specific thing he did, which definition you will get, there is no requirement that he actually read that Executive Order, none whatsoever. That Executive Order and the rationing laws and the rationing regulations, as his Honor will tell you, were in effect at all times material to this case. Rationing was in effect, and the regulations governing rationing, as his Honor will tell you, were at all times in effect, at all times material in this case. There is not any problem as to the law. But as to whether he acted willfully, whether he did this in such a way that it simply is not an unconscious act on his part, well, he certainly wrote his name when he wrote out these checks. There is no question as to that. He was not asleep when he did that, and he certainly bought the sugar. He was acting consciously

and deliberately when he did that and I think, as I have pointed out, the evidence shows that he certainly intended these checks to be used for that sugar and he certainly intended these checks to be used as ration checks.

In some instances if you consult an attorney before you do [677] anything, that is one of the factors to be considered as to whether you acted willfully. But in this case it has nothing to do with it, because he did not consult the attorney until 12 days after he issued the checks.

How could his attorney's advice have had any effect on his original issuance of the checks?

It seems to me, ladies and gentlemen, that you do not have very many questions to decide in this case because the evidence is rather clear.

Again I repeat to you what I said at the outset. I am interested in putting the truth before you. You have heard some conflicting evidence, and you have heard some evidence that is not conflicting. You have had an opportunity to analyze the witnesses, and you have heard about the way the defendant acted on various other occasions in connection with the issuance, the sending of documents to the Government agency involved.

If you feel that the defendant did not act in the way charged in the information, you should acquit him.

If, on the other hand, you feel that the defendant acted as charged, that he did it willfully and deliberately and intendedly; that he did it for the purpose of getting sugar, as the Government charges and as I have tried to point out to you, then you should convict him.

Your duty is equally clear in either respect. I thank you. [678]

The Court: Ladies and gentlemen of the jury, it is now six minutes past 12:00. I deem it better to give you the instructions after the recess.

You will not discuss the matter among yourselves or permit anyone to discuss it in your presence. Do not form or express any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 2:00 o'clock.

(Whereupon, at 12:06 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [679]

Los Angeles, California, Tuesday, February 11, 1947
2:00 P. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 19,106 criminal,
United States v. Paul J. Ziegler for further jury trial.

Mr. Strong: Ready for the Government.

Mr. Carr: The defendant is ready.

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulate.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

COURT'S INSTRUCTIONS TO THE JURY

The Court: Members of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

The United States Attorney has filed an information in this case in this court on December 31, 1946, United States of American, plaintiff, versus the West Coast Supply Company, [680] a partnership, and Paul J. Ziegler.

The United States Attorney charges:

"Count One: On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, willfully and unlawfully performed acts prohibited by Section 15.7 (d) of Third Revised Ration Order No. 3, in that said defendants did willfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Union Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Six Hundred Thousand (600,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles,

when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.

“Count Two: From on or about July 3, 1946, to on or about August 17, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, willfully and [681] unlawfully performed an act provided by Section 2.9 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Three Hundred and eighty Thousand (380,000) pounds of sugar from the Union Sugar Company, in exchange for a ration document, to wit, a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Six Hundred Thousand (600,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check.

“Count Three: On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7 (d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an

amount larger than the balance in the account on which it was drawn, less the amount of issuing and causing to be issued to the Spreckels Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Thirty Thousand (30,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.

“Count Five: On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7 (d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the Holly Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Six Hundred and Sixty Thousand (660,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, when the West Coast Supply [683] Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.

“Count Six: From on or about July 1, 1946, to on or about August 30, 1946, in Los Angeles County, California, within the Central Division of the Southern dis-

trict of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed an act prohibited by Section 2.9 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Six Hundred and Sixty Thousand (660,000) pounds of sugar from the Holly Sugar Company, in exchange for a ration document, to wit, a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Six Hundred and Sixty Thousand (660,000) pounds of sugar on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check.

“Count Seven: On or about July 1, 1946, in Los Angeles County, California, within the Central Division [684] of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed acts prohibited by Section 15.7 (d) of Third Revised Ration Order No. 3, in that said defendants did wilfully and unlawfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing and causing to be issued to the C & H Sugar Company a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Eighty Thousand (80,000) pounds of sugar, on the Union

Bank and Trust Company of Los Angeles, when the West Coast Supply Company had a balance in its accounts at said bank in an amount insufficient to cover the amount of said check.

“Count Eight: On or about July 5, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants, West Coast Supply Company, a partnership, and Paul J. Ziegler, wilfully and unlawfully performed an act prohibited by Section 2.19 of General Ration Order No. 8, in that said defendants did wilfully and unlawfully receive a rationed commodity, Eighty Thousand (80,000) [685] pounds of sugar from the C. & H Sugar Company, in exchange for a ration document, to wit, a sugar ration check drawn by and on behalf of the said West Coast Supply Company and Paul J. Ziegler in the amount of Eighty Thousand (80,000) pounds of sugar, on the Union Bank and Trust Company of Los Angeles, dated July 1, 1946, and issued by the defendants, when said defendants knew and had reason to believe that the said ration document was not validly issued because the said West Coast Supply Company did not have a sugar ration bank account in said bank with a balance therein sufficient to cover the amount of said check.”

To each of these counts the defendant has pleaded not guilty, and that puts on to the Government proof of every material allegation of those counts that they must prove beyond a reasonable doubt.

By the filing of this information no presumption whatever arises to indicate that the defendant is guilty or that he has any connection or responsibility for the acts charged against him.

A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt.

The burden is not upon the defendant to establish his [686] innocence, and this rule applies to every material element of the offense. Mere suspicion or mere probability will not authorize a conviction. A reasonable doubt is such doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture, for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you.

Without it being re-stated or repeated, you are to understand that the requirement that a defendant's guilt is shown beyond a reasonable doubt is to be considered in connection with and as accompanying all of the instructions that are given to you.

The Second War Powers Act of 1942, as it applies during the period involved in this case, provides in part as follows:

“* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of

the [686] United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.”

The Act also provides that:

“Any person who willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor”

The Second War Powers Act, as applicable in this case, also provides that:

“The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe”

I now instruct you that at all times material to this case, the Office of Price Administration was the agency which was given the power to ration sugar and to prescribe regulations as to such rationing, and that it did do so.

The said Second War Powers Act of 1942 is thus the law, [687] authorizing the rationing of various commodities, including sugar. This law was adopted by the Congress of the United States pursuant to authority given to Congress by the Constitution. You are not to be concerned with the wisdom or unwisdom of this Act or the Executive Orders or Regulations thereunder, or the

general theory or policy of rationing. They are the law of the land and you must be governed by them in the determination of this case.

Among the Rationing Regulations promulgated under the authority of the said Second War Powers Act of 1942 is General Ration Order No. 8 and 3rd Revised Ration Order No. 3. I now instruct you that these ration orders were in effect on all dates material to this case. The termination on July 1, 1946, of the Emergency Price Control Act of 1942 had no effect upon sugar rationing, since sugar rationing was in effect under the Second War Powers Act, which did not terminate.

I further instruct you that on June 30, 1946, the President of the United States issued an Executive Order by which he continued in effect the Office of Price Administration as the enforcement agent for that purpose. This the President had the right to do.

Sec. 2.9: “. . . No person shall . . . receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not [688] acquired in accordance with a ration order by the person tendering it.”

By “evidence” is meant sugar ration checks, coupons or stamps.

Definitions: “‘Check’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.”

I charge you that “alteration” means a change in the terms of a written instrument by a party entitled thereunder, without the consent of the other party, by which its meaning or language is changed.

“Ration credits” means the credits in an account reflecting deposits of stamps, coupons or checks.

You are instructed that the evidence adduced at the trial was insufficient to prove the defendant, Paul J. Ziegler, was at any of the times mentioned in any or all counts of the information a partner of the West Coast Supply Company. You will accordingly find, therefore, that Paul J. Ziegler was not at any of the times mentioned in the information a partner of the said West Coast Supply Company.

In each count of the information, defendants are alleged to have willfully and unlawfully done the acts and things of which they are accused. In this connection you are instructed [689] that there is a very real and vital difference between simply doing an act and doing the act willfully.

In the first case no intent is involved, while in the second case of willfully doing the act the element of guilty knowledge and specific intent to do that which the law denounces are involved and constitutes the gist of the offense.

You are instructed that under the statute involved in this proceeding it is necessary, in order to find the defendant guilty, that you find he violated the law willfully.

The word “willfully” as used in the information means an intentional, conscious doing of the act prohibited; that is, intending the result which actually comes to pass, without regard or believing it is lawful or, in other words, marked by careless disregard as to whether or not one has the right so to act.

To express it in another way, it means purposely or obstinately, or designed to describe the attitude of a per-

son who, having a free will or choice, either intentionally disregards the law or is plainly indifferent to its requirements.

You should not be influenced in reaching your verdict in this case solely by reason of the amount of sugar involved, for you must, in order to convict a defendant of any count of the information, find that each and every material allegation thereof has been proved beyond a reasonable doubt.

You are instructed that, if you find from the evidence that [690] at the time any or all of the sugar ration checks alleged in Counts One, Three, Five and Seven of the information were issued, there were sufficient ration credits available in any or all of the accounts of the West Coast Supply Company in the Union Bank and Trust Company to cover said sugar ration check or checks, then you must acquit the defendant, Paul J. Ziegler, on the counts relating to said checks.

The law does not require that the defendant have actual knowledge of the provisions of the Second War Powers Act of 1942, of General Ration Order No. 8, or the Third Revised Ration Order No. 3, governing the rationing of sugar. All persons, including those who use or deal in sugar, are charged by law with notice of the statute and ration orders and their contents because of publication in the Federal Register, a daily official Government publication which is available to all persons.

The statute which makes the mere publication of a law or regulation in the Federal Register constructive notice of its contents to every person also contains a provision to the effect that such publication of a document creates a rebuttable presumption that the document was duly issued, prescribed, promulgated, filed.

The information upon which the defendants are being tried contains eight counts. Counts One, Three, Five and Seven thereof charge the defendants with having willfully and [691] unlawfully issued and caused to be issued a sugar ration check, each for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account, by issuing or causing to be issued a sugar ration check drawn by and on behalf of said West Coast Supply Company and Paul J. Ziegler when the West Coast Supply Company had a balance in its account in an amount insufficient to cover the amount of each of said checks. The amount of the check in Count One is 600,000 pounds of sugar; in Count Three, 30,000 pounds of sugar; in Count Five, 660,000 pounds of sugar; and in Count Seven, 80,000 pounds of sugar.

The Government is required to prove each and every material allegation of each count of the information beyond a reasonable doubt. Unless every material allegation of the charge is proved against the defendant, you must acquit the defendant.

Counts Two, Four, Six and Eight charge that defendants willfully and unlawfully received a rationed commodity, to-wit, sugar, in exchange for a sugar ration check drawn by and on behalf of the West Coast Supply Company and Paul J. Ziegler on the Union Bank and Trust Company of Los Angeles and issued by the defendants when the said defendants knew and had reason to believe that the check was not validly issued because the West Coast Supply Company did not have a sugar ration bank account in said bank with a balance sufficient to cover the amount of the check. [692]

Count Two charges the receipt of 380,000 pounds of sugar; Count Four, 30,000 pounds of sugar; Count Six, 660,000 pounds of sugar; Count Eight, 80,000 pounds of sugar.

The Government is required to prove each and every material allegation of each count of the information beyond a reasonable doubt. Unless every material allegation of the charge is proved against the defendant, you must acquit the defendant on that count.

Paragraph 15 of Section 24.1 of Third Revised Ration Order No. 3 provides:

“‘Issue’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.”

Paragraph 8 of the same section provides:

“‘Delivery’ means the transfer or physical possession or the transfer of a document of title.”

Paragraph 16 of the same section provides in part that:

“‘Person’ means any individual, partnership, corporation, association, or other organized group of persons . . . or any agency thereof . . .”

If you believe beyond a reasonable doubt that the defendant acted by or through an agent, employee or other person and that such agent, employee or other person acted with the knowledge of the defendant, and that the defendant knowingly accepted the benefit of his agent, employee or other person’s [693] act, you will hold the defendant to be responsible as if he had personally done the act which was performed by his agent, or employee, or other person.

“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids,

abets, counsels, commands, induces or procures its commission, is a principal."

No personal feeling or prejudice must be allowed in any manner to influence or direct you in connection with any issue in this information. It is of no consequence whether you may or may not approve of the appearance, conduct or general bearing of the defendant. If, in your opinion, having heard all the testimony, you are not able to say that after a full and fair comparison of the evidence that you believe that the defendant is guilty to a moral certainty and beyond a reasonable doubt, you are instructed and directed to return a verdict of not guilty.

I instruct you that if the defendant, Paul J. Ziegler, honestly and in good faith sought the advice of a lawyer as to what he might lawfully do in the matter involved in this action and fully and honestly laid all of the facts before his counsel, and in good faith and honesty followed that advice, relying upon it and believing it to be correct, but only intended that his acts should be lawful, he could not be found guilty of this offense which involves willful and unlawful [694] intent, even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

The court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their application depends upon the light in which you view the evidence.

The fact that the court has given you instructions as to particular rules of law must not be taken by you as an

indication that such rules are necessarily applicable to the cause on trial, or as indicating that the court considers them necessarily applicable.

Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.

If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instruction into consideration in your deliberations.

You are the sole judges of the credibility and weight which is to be given to the different witnesses who have [695] testified upon this trial. In judging the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, may be repelled by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony or by evidence.

In judging the credibility of the witnesses in this case you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it as may be dictated by your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties to this action, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if

at all, and every matter that tends reasonably to shed light upon his credibility.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your minds as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses [696] merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient to support the proof of any fact that would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case considering the credibility of the witnesses and after weighing the various factors of evidence the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who willfully has testified falsely to a material point, unless from all the evidence you shall believe that the probability of truth favors his testimony in other particulars.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to

estimate and determine his credibility in the same way as you would consider the testimony of any other witness.

It is proper to consider all of the matters that have [697] been suggested to you in that connection, including the interest the witness may have in the case, his hopes, his fears and what he has to gain or lose as a result of your verdict.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

Admissions of a defendant are to be received with caution. Evidence may be either direct or indirect.

Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes the fact.

Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from [698] the facts proved. It must be

founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature.

The word "propensity" as used in these instructions means an act or habitual inclination or tendency.

The law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence. Or, stated in another form, it is not sufficient that the circumstances proved coincide with or account for and, therefore, render probable the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty.

In order to warrant a conviction of crime from circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt.

All the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the defendant and no other person committed the offense charged. And unless the evidence does so, it will be your duty to acquit the defendant.

So, ladies and gentlemen, you will observe that there is nothing very peculiar or hard to understand about this doctrine of circumstantial evidence.

The jury, in the first place, must determine from the testimony of the witnesses what are the facts and circumstances in the case, the facts and circumstances which you believe have been established by the testimony; and then you simply apply your common sense and judgment to a consideration of what deductions or inferences or conclusions ought to be drawn from the facts.

If, on consideration of all the facts which you may believe to have been established by the evidence, you are satisfied in your minds beyond a reasonable doubt that the defendant is guilty, then it is your duty to so declare. But if you are not so satisfied, it will be your duty to render a verdict of not guilty.

You shall not consider as evidence any statement or argument of counsel made during the trial, unless such statement [700] or argument was made as an admission or stipulation conceding the existence of a fact or facts, or you find justified by the evidence.

You must not consider for any purpose any evidence offered or rejected or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it.

You are to decide this case solely from the evidence that has been admitted by the court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom as directed in my instructions and in accordance with the law as I shall state it to you.

At times throughout the trial the court has been called upon to pass upon the question whether or not certain

evidence was properly admitted. With such ruling and the reason for them you are not to be concerned.

Whether offered evidence is admissible is purely a question of law; and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence or as to the credibility of a witness. In admitting evidence to which an objection is made, the court does not determine what weight should be given to the evidence.

As to every offer of evidence which has been rejected by the court, you, of course, must not consider the same.

As to any question as to which an objection was sustained, you must not conjecture as to what the answer might have been [701] or as to the reason for the objection.

In judging of the evidence you are to give it a reasonable and fair construction, and you are not authorized because of any feeling of sympathy or other bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion.

Whenever after a careful consideration of all the evidence your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none should be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others,

but you are to consider all the instructions as a whole and to regard each in the light of all the others.

There is nothing peculiarly different in the way a jury is to consider the proof in this case from that by which men and women give their attention to any question depending upon evidence presented to them.

You are expected to use your good sense, consider the evidence for the purpose only for which it has been admitted [702] and in the light of your knowledge of the propensities and tendencies of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

In determining what your verdict shall be you are to consider only the evidence before you. To the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

You are instructed that if I have said anything or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

While the law permits the judge of this court to express an opinion on the evidence, I have not expressed nor intended to express, nor have I intimated or intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established or what inferences should be drawn from the evidence adduced.

If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

You must weigh and consider this case without regard to [703] sympathy, prejudice or passion for or against any party to this action. The attitude of jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused and he may hesitate to recede from an announced position if and when shown that it is fallacious.

Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return into this court room, not in the opinions any of you may hold as you retire.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end the court would remind you that in your deliberations in the jury room there can be no triumph, excepting the ascertainment and declaration of the truth.

It is your duty as jurors to consult with one another and deliberate with a view to reaching a verdict, if you can do so, without violence to your individual judgment.

To each of you I would say that you must decide the case for yourself but should do so only after a consideration of the [704] case with your fellow jurors, and you

should not hesitate to change an opinion when convinced that it is erroneous.

However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors or any one of them favor such a conclusion.

In other words, you should not surrender your honest convictions concerning the weight or effect of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Upon retiring to your jury room you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you agree.

As soon as you shall have agreed upon a unanimous verdict, you shall have it signed and dated by your foreman and then shall return with it into this court room.

A blank form of ballot will be given to you:

“In the District Court of the United States,

“In and for the Southern District of California, Central Division

“United States of America, Plaintiff, versus Paul J. Ziegler, Defendant, No. 19106 Criminal, Verdict of the Jury.

“We, the jury in the above entitled case, find the defendant Paul J. Ziegler”

Then there is a blank line, and in that blank line you [705] will write the word “guilty” or “not guilty as charged in the first count of the information.”

A similar line has been typed into this form of ballot for each of the counts, and in each one of those blank lines you will write either "guilty" or "not guilty."

"Dated: Los Angeles, California, February . . ."

Then a blank which you will fill in,

". . . 1947."

Then there is a blank line under which there are the words "Foreman of the jury," to be signed by the foreman.

Are there any additional exceptions to the ones that are already in the record, gentlemen?

Mr. Strong: None, your Honor.

Mr. Carr: None, your Honor.

The Court: Swear the bailiffs.

(Whereupon, the bailiffs were duly sworn.)

The Court: You may retire to the jury room.

(Whereupon, at 2:49 o'clock p.m. the jury retired to the jury room to deliberate.)

The Court: Will counsel for the defendant and the defendant check the exhibits before they go to the jury room?

(Brief pause in the proceedings.)

Mr. Carr: Are you sending the information in, your Honor?

The Court: What? [706]

Mr. Carr: Are you sending the information in?

The Court: Is there any suggestion on the part of counsel?

Mr. Carr: I should like for it to go, your Honor, because there are a number of counts.

The Court: All right, that settles it.

Mr. Strong: I have no objection.

The Court: It will go.

The Clerk: The information is to go to the jury, your Honor?

The Court: Yes. Mr. Carr has suggested he would like to have the jury have it, and the Government has no objection. So the jury is permitted to have it.

(Court in recess as to the above-entitled cause.)

(At 4:33 o'clock p.m. the jury returned to the court room.)

The Court: Do you stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Strong: So stipulated.

Mr. Carr: So stipulated.

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have, your Honor. [707]

The Court: Will you hand it to the bailiff?

The clerk will read the verdict.

The Clerk: "In the District Court of the United States, in and for the Southern District of California, Central Division. United States of America, Plaintiff v. Paul J. Ziegler, Defendant, No. 19106 Criminal, Verdict of the Jury.

"We, the jury in the above entitled case, find the defendant Paul J. Ziegler, guilty as charged in the first count of the information; guilty as charged in the second count of the information; guilty as charged in the third count of the information; guilty as charged in the fourth count of the information; guilty as charged in the fifth count of the information; guilty as charged in the sixth count of the information; guilty as charged in the seventh count of the information, and guilty as charged in the eighth count of the information.

"Dated: Los Angeles, Calif., February 11, 1947.

"Ivan W. Newport
Foreman of the jury."

So say you all, ladies and gentlemen?

(Assent.)

The Court: Does either side wish to have the jury polled?

Mr. Strong: No, your Honor. [708]

Mr. Carr: No, your Honor.

The Court: Ladies and gentlemen of the jury, you will be excused from further consideration of this case, and you will be notified by the clerk of the court when you shall appear for further jury duty. You may be excused.

(Jury excused at 4:36 o'clock p.m.)

The Court: What is the bail in this case, gentlemen?

Mr. Carr: There is no bail at the moment, your Honor. And I should like to ask that be continued. This man is a responsible business man and a lawyer at the bar. I see no possible suggestion that he would in any way leave the community. He has a substantial business. I should like for your Honor to continue that.

The Court: What is the position of the Government?

Mr. Strong: I have no objection to that, your Honor, at the present time.

The Court: It is the opinion of the court that this defendant in this case will hold himself amenable to all the orders of the court. I do not believe it is necessary to either remand him to the marshal or to require bail at this time.

You have 10 days to make the motions, Mr. Carr.

Mr. Carr: Your Honor, as a matter of fact, I have five days under that Rule 29 under that motion for acquittal, to renew that; and I believe the rule provides in the alternative [709] for a motion for a new trial, and under another rule motion for arrest of judgment.

I anticipate renewing that motion in written form. I trust your Honor will take that into consideration in setting the time.

I might suggest this to your Honor: that I believe the case in Washington is to be decided—at least, there is some anticipation—about the 14th. Now, it may be a day or two or three or four days; it may be shortly thereafter. So I wondered if your Honor wanted to wait and see what happens in that case? That involves this whole rationing setup, you know, and also Mr. Christensen's case

is up in the Circuit Court and he has raised this question on which I made my offer of proof. That will come up sometime in the near future, I take it.

Mr. Strong: Well, the only thing is, I submit, your Honor, there are constantly cases coming up involving problems; and I don't think that sentences should be held in abeyance pending the solution of all problems involved.

The Court: The court will hear any and all motions that might be filed under the rules in this court on Tuesday, February the 18th, at 10:00 a.m.

Mr. Carr: The 18th, your Honor?

The Court: Yes, the 18th of February.

Court will now be in recess.

(Whereupon, at 4:40 o'clock p.m., February 11, 1947, [710] the hearing in the above-entitled matter closed.)

[Endorsed]: Filed May 27, 1947. [711]

[Endorsed]: No. 11555. United States Circuit Court of Appeals for the Ninth Circuit. Paul J. Ziegler, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 13, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11555

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND ORDER EXTENDING TIME
FOR FILING AND DOCKETING

It Is Hereby Stipulated, by and between the parties hereto, through their respective Counsel, that Appellant may have to and including the 20th day of June, 1947, within which to file and docket the Record on Appeal in the above entitled matter, subject to Order of Court.

Dated: May 28, 1947.

CHARLES H. CARR

Attorney for Appellant Paul J. Ziegler

JAMES M. CARTER

U. S. Attorney

Attorney for Appellee, United States of America

It Is so Ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

A true copy attest: May 29, 1947.

(Seal)

PAUL P. O'BRIEN,

Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT IN SUPPORT OF STIPULATION EXTENDING TIME FOR FILING AND DOCKETING RECORD ON APPEAL

State of California, County of Los Angeles—ss.

Charles H. Carr, being first duly sworn, deposes and says:

That he is the Attorney of record for the Appellant herein, Paul J. Ziegler;

That Notice of Appeal was filed by and on behalf of Appellant, Paul J. Ziegler, on February 25, 1947;

That the time within which to file and docket the Record on Appeal with the United States Circuit Court of Appeals for the Ninth Circuit in the above matter was, on the 17th day of March, 1947, extended by the United States District Court for the Southern District of California to and including the 1st day of June, 1947, and, on April 8, 1947, an Order was issued by the United States Circuit Court of Appeals for the Ninth Circuit extending the time within which to file and docket the Record on Appeal in this case to and including the 1st day of June, 1947;

That it was necessary for your affiant to be away from the city of Los Angeles on business for almost an entire month during April and May, 1947, which business required his presence in Detroit, Michigan, Washington, D. C., and New York City;

That on April 2, 1947, the associate in your affiant's office, who had assisted him in the trial of this case and who was attending to the procedural matters in connection with this appeal, was sworn in as a Municipal Judge

of the city of Los Angeles, namely, Judge Mildred L. Lillie; that the accession of Judge Lillie to the Municipal Court necessitated a reorganization of your affiant's office staff and the acquisition of other personnel;

That your affiant has been engaged in two complicated tax matters which have taken a considerable portion of his time in addition to his general practice;

That affiant also had to move his law office during the latter part of 1946 prior to the time when the quarters had been completed, and during the past few months your affiant has encountered the many difficulties attendant to setting up a new office;

That the trial in this case consumed six (6) full days, and the transcript of the proceedings consists of five (5) volumes; that there were also approximately fifty (50) exhibits, some of which are voluminous;

That it was necessary for your affiant to read and check the transcript of testimony before filing the same with the Clerk of the District Court, and your affiant was unable to finish the reading and checking of the transcript prior to May 27, 1947;

That under Rule 75, subdivisions (a) and (b), Federal Rules of Civil Procedure, appellant is required to serve upon the appellee and file with the district court a designation of the portions of the record to be contained in the record on appeal, and at that time appellant is required to file with his designation two copies of the reporter's transcript; that your affiant has been unable to do this by reason of the foregoing and the remaining time between now and June 1, 1947, the last day as extended within which to file and docket the record on appeal, is insufficient to permit the Clerk of the United States District Court for

the Southern District of California to prepare and certify the record for filing with the United States Circuit Court of Appeals for the Ninth Circuit;

That your affiant does not anticipate that any further extension of time within which to file and docket the Record on Appeal in this case will be necessary;

That the United States District Court for the Southern District of California has, on the 28th day of May, 1947, issued an order extending the time within which to file and docket the Record on Appeal in this case to and including the 20th day of June, 1947; however, your affiant believes that there may be some question that the District Court has jurisdiction to so extend the time for the filing and docketing of the Record on Appeal under Rule 73(g) of the Federal Rules of Civil Procedure and Rule 39(c) of the Federal Rules of Criminal Procedure, and, in an abundance of caution, seeks an order from the Circuit Court.

Wherefore, affiant prays for an extension of time to and including the 20th day of June, 1947, within which to file and docket the Record on Appeal.

CHARLES H. CARR

Attorney for Appellant, Paul J. Ziegler

Subscribed and sworn to before me this 28th day of May, 1947.

(Seal)

FAE BLOCK

Notary Public in and for said County and State

[Endorsed]: Filed May 29, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant, Paul J. Ziegler, herewith sets forth a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in admitting into evidence Exhibits 3, 4, 5, 6, 40, 41, 42, 43 and 44.

II.

The District Court erred in permitting the witness, Albert F. Leland, to read the contents of a copy of a telegram, Exhibit 11, for identification.

III.

The District Court erred in admitting the testimony of the witness, Kenneth E. Pool, Inspector of the State Department of Public Health, relating to finding contaminated nut meats at the West Coast Supply Company; his discussion with the Appellant, Paul J. Ziegler, and also his testimony relative to a conversation with the Appellant, Paul J. Ziegler, concerning sanitary conditions at his plant.

IV.

The District Court erred in admitting the testimony of the witnesses, Stephen D. Ramseur and Benjamin H. Tingle, Investigators for the Alcohol Tax Unit (although later stricken).

V.

The District Court erred in admitting the testimony of the witnesses, Lomax Young and Charles E. Gould, Agents of the Office of Price Administration, relating to conversations with Allan Ziegler concerning Appellant, Paul J. Ziegler.

VI.

The District Court erred in admitting the testimony of Thaddeus R. Loud, Agent of the Office of Price Administration, concerning alleged conversation with Appellant, Paul J. Ziegler, in February, 1946.

VII.

The District Court erred in denying the motion of Appellant, under Rule 29 of the Rules of Criminal Procedure, for the Court to enter a judgment of acquittal on each and every count of the Information.

VIII.

The District Court erred in permitting the Assistant United States Attorney to call upon Appellant, while he was on the witness stand, to produce private papers and in compelling Appellant to produce as evidence his private papers, to wit: Exhibits 40, 41, 42, 43 and 44.

IX.

The District Court erred in permitting the Assistant United States Attorney to cross examine Appellant concerning previous transactions of his relating to the purchases of sugar.

X.

The District Court erred in commenting and in permitting the Assistant United States Attorney to comment concerning Appellant's privilege against self-incrimination while Appellant was on the witness stand.

XI.

The District Court erred in refusing to admit the expert testimony of the witness, John B. Schneider, relating to the available supply of sugar.

XII.

The District Court erred in giving Government's requested instructions 2, 3, 4, 6C, 7, 8, 11 and 12.

XIII.

The District Court erred in refusing to give Appellant's requested Instructions 16, 18, 20, 21, 22, 26, 27, 34, 35, 36, 37 and 39.

XIV.

The District Court erred in allowing the Assistant United States Attorney to improperly argue the case to the jury.

CHARLES H. CARR

Attorney for Appellant

Received copy of the within Statement of Points on Which Appellant Intends to Rely on Appeal this 20th day of June, 1947. William Strong for James M. Carter, U. S. Attorney, Attorney for Appellee, United States of America.

[Endorsed]: Filed Jun. 23, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER OF COURT TO
CONSIDER ORIGINAL EXHIBITS

Comes now Paul J. Ziegler, Defendant and Appellant above named, by and through his attorney, Charles H. Carr, and makes application to this Honorable Court as follows:

That this Honorable Court consider as a part of the Record on Appeal all original Exhibits in the above-named action which have been transmitted by the Clerk of the U. S. District Court for the Southern District of California to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit and which have not been made a part of the printed record.

This application is being made upon the ground that a number of the original Exhibits are so long that it would be impractical and costly to include them all in the printed record.

Dated: June 23, 1947.

Respectfully submitted,
CHARLES H. CARR
Attorney for Defendant and Appellant

[Title of District Court and Cause]

ORDER OF COURT TO CONSIDER ORIGINAL
EXHIBITS

It Appearing that Paul J. Ziegler, Defendant and Appellant above named, has filed Notice of Appeal in the above matter and is now in the process of perfecting said Appeal;

It Also Appearing that Counsel for Appellee on the 2d day of June, 1947, has consented with Attorney for Appellant herein that all the original Exhibits be forwarded by the Clerk of the U. S. District Court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit;

It Further Appearing to the Court that on the 2d day of June, 1947, the Honorable J. F. T. O'Connor, U. S. District Judge for the Southern District of California, signed an order for transmission of all original Exhibits to the Ninth Circuit Court of Appeals;

It Is Ordered that all of the original Exhibits in the above action may be made a part of the Record on Appeal in the above-entitled matter to be considered by this Honorable Court in the within Appeal in their original form, as transmitted by the Clerk of the U. S. District Court, save and except those Exhibits which have been designated and made a part of the printed Record on Appeal.

Dated: This 25th day of June, 1947.

FRANCIS A. GARRECHT

Judge, U. S. Circuit Court of Appeals for the Ninth Circuit.

Received the within Application and Order of Court to Consider Original Exhibits this 23rd day of June, 1947. James M. Carter, United States Attorney for the Southern District of California; by William Strong, Assistant U. S. Attorney.

[Endorsed]: Filed Jun. 25, 1947. Paul P. O'Brien, Clerk.

No. 11555

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

CHARLES H. CARR,
675 Subway Terminal Building, Los Angeles 13,
Attorney for Appellant.

FILED
NOV 20 1947

PAUL P. O'BRIEN,

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No. 11555

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of California, after verdict of a jury, wherein the Appellant was found guilty on all counts of an Information in eight counts filed in said District Court, charging him with violating Third Revised Ration Order No. 3, Sec. 15.7(d), and General Ration Order No. 8, Sec. 2.9, relating to ration documents and sugar rationing, promulgated pursuant to the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 *et seq.* The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 2-8].

The jurisdiction of the District Court was based upon the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633(6).

This court has jurisdiction to entertain this appeal under the provisions of Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225.

Statement of the Case.

The Appellant was convicted after trial before a jury in the United States District Court for the Southern District of California on February 18, 1947, on all counts of an Information in eight counts filed in said District Court, charging him with four violations of Sec. 157(d) of Third Revised Ration Order No. 3 (Counts ONE, THREE, FIVE and SEVEN) and four violations of Sec. 2.9 of General Ration Order No. 8 (Counts TWO, FOUR, SIX and EIGHT), both of which ration orders were issued pursuant to authority granted the President by Congress in the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 [R. 2-8]. The West Coast Supply Company, a partnership, was made a co-defendant with the Appellant in the Information; however, a judgment of acquittal to all counts was ordered entered by the District Court as to that defendant [R. 442-3].

More particularly, Count ONE of the Information charged that the defendants did wilfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account. Counts THREE, FIVE and SEVEN are similar to Count ONE except that each of these counts alleges a different sugar ration check. Counts TWO, FOUR, SIX and EIGHT charge that the defendants did wilfully and unlawfully receive a rationed commodity, namely sugar, in exchange for a sugar ration check drawn by defendant Ziegler on the account of the West Coast Supply Company when the defendants knew that the ration document was not validly issued because the West Coast Supply Company did not have a balance in its account sufficient to cover the check.

All the checks are alleged to have been issued on or about July 1, 1946, in Los Angeles County, California, and all the sugar is alleged to have been received during

a period from on or about July 3, 1946, to on or about August 17, 1946. The sugar allegedly received by the defendants, as charged in the even-numbered counts is charged to be the sugar obtained by means of the alleged illegally issued ration checks referred to in the odd-numbered counts. The odd-numbered counts purport to allege violations of Third Revised Ration Order No. 3, Sec. 15.7(d), and even-numbered counts purport to allege violations of General Ration Order No. 8, Sec. 2.9. (These ration orders are set forth in the Appendix.)

Prior to trial, the Appellant moved to dismiss the Information and the Appellee moved to strike the Appellant's motion to dismiss, both of which were denied, whereupon the Appellant entered a plea of not guilty to each count and the cause was set for trial on February 4, 1947 [R. 9-10].

The Appellee moved to amend the Information, which motion was granted, the amendments appearing by interlineation in the Information, and the cause proceeded to trial before a jury commencing on February 4, 1947 [R. 11]. At the conclusion of the Appellee's case, the Appellant moved for a judgment of acquittal, which motion was denied [R. 311-17]. This motion was renewed by the Appellant at the conclusion of the defense and again denied [R. 443-51].

After argument by counsel, the instructions of the Court were duly given and the cause submitted to the jury on February 11, 1947. On the same date the jury returned a verdict of guilty on all eight counts [R. 41, 641].

The Appellant renewed his motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure and the same came on for hearing before the Court on February 18, 1947, and was denied [R. 43], whereupon the Court sentenced the Appellant to imprisonment for a period of three months in an institution of the jail type on each of the eight counts of the Informa-

tion, the sentences on all counts to run concurrently, and the execution of the jail sentence was suspended and the Appellant placed on probation for sixty days on each of the eight counts, the term of probation to begin and run concurrently. The Appellant was also fined the sum of \$2,500.00 on each of the eight counts of the Information, making a total fine of \$20,000.00 [R. 44, 45]. Notice of Appeal was filed on February 25, 1947 [R. 46-7].

Summary of the Facts.

The West Coast Supply Company, a partnership consisting of the Appellant's father, J. H. Ziegler, and two brothers, doing business in Los Angeles, California, as wholesalers of jams, jellies and allied products, had three separate sugar ration bank accounts in the Union Bank & Trust Company, Los Angeles, California, prior to and on July 1, 1946 [R. 333-35]. One account was called a wholesale account, another a processing account, and a third an industrial account [R. 64]. The Appellant, a lawyer in active practice in Los Angeles, California, from 1925 to 1943, devoted a considerable part of his time to the business of the West Coast Supply Company during the year 1943, principally as advisor to said Company in the dealings of that Company with the Office of Price Administration and other Governmental agencies [R. 333-35].

In February, 1944, the Appellant became a partner with his father, John H. Ziegler, in the John H. Ziegler Company, a partnership consisting of the Appellant and his father, at which time the latter company took over the manufacturing operations of the West Coast Supply Company and occupied premises next to the West Coast Supply Company on Long Beach Avenue, Los Angeles, California [R. 335-37]. On the signature card for the sugar ration accounts of the West Coast Supply Company with the Union Bank & Trust Company, the Appellant's name

appeared as one of those authorized to draw checks on these accounts [Government's Exhibit No. 2].

The John H. Ziegler Company was a separate business from the West Coast Supply Company, having separate bank accounts and separate employees [R. 337-38].

During May and June, 1946, while the debates were in progress in Congress relative to whether the O. P. A. should be extended for another year, Appellant discussed with various brokers the possibility of obtaining sugar in the event rationing of sugar should be terminated [R. 156, 345]. He was told that there was considerable sugar available—in fact, the warehouses were filled with it [R. 346]. In order to continue to operate his plant, sugar had to be obtained. During June, Appellant told certain brokers of sugar that he wished to be in a position to obtain sugar immediately, thinking that there would be a sudden rush to purchase if rationing should end [R. 346].

On June 29, 1946, the President vetoed the bill extending the O. P. A., and on the following day, Sunday, he went on the radio in a speech to the nation explaining his reasons for the veto. Appellant listened to that speech and concluded that, with the termination of the O. P. A., sugar was in a free market and no longer rationed [R. 349].

The following morning, Monday, July 1, 1946, Appellant immediately contacted the sugar brokers he had previously spoken to and arranged for the purchase of the sugar which brought about the instant case [R. 126, 165, 349]. The purchases were made by telephone. The brokers insisted upon Appellant supplying ration checks despite his contention that, since O. P. A. no longer existed, rationing was at an end. He gave four checks—one for 80,000 lbs. of sugar, Exhibit 3 [R. 209]; one for 660,000 lbs., Exhibit 4 [R. 183]; one for 30,000 lbs., Exhibit 5 [R. 232]; and one for 600,000 lbs., Exhibit 6 [R. 298], all of which were signed Paul J. Ziegler. After the checks

were either mailed or picked up by the respective brokers, someone inserted on each of the checks, just above Appellant's signature, "Paul J. Ziegler," the words "West Coast Supply Co." or "West Coast Supply Company" [R. 172-4, 187, 340-1-2].

Two of the brokers had called Appellant and asked him if he did not think West Coast Supply Company should be on the checks, to which he said "No" [R. 343]. One of the brokers, after first denying that the name West Coast Supply Company had been inserted, claimed that he told Appellant that they would have to insert the name and that Appellant said all right [R. 172].

The West Coast Supply Company's ration account at the Union Bank & Trust Company showed a balance of 34,717 pounds on June 30, 1946 [Exhibit 1; R. 79-80]. Exhibits 3, 4, 5 and 6, the checks, were charged to that account and treated as overdrafts.

On June 30, 1946, the President issued Executive Order 9745 which was not filed for publication in the Federal Register until July 1, 1946, at 10:32 a. m., Exhibit F [R. 350-2].

Executive Order 9745 provided for the continued administration, on an interim basis, of certain functions of the O. P. A. relating to rationing.

Appellant did not become acquainted with Executive Order 9745 until toward the end of July or the first of August, 1946, long after he had purchased the sugar involved [R. 352]. As a matter of fact, all of the sugar in question had been delivered prior to the time that Appellant's attorney located Executive Order 9745 and obtained a copy thereof. All of the sugar had been paid for and delivered by July 12, 1946, Exhibits 12 and 13 [R. 137, 354-5].

Specifications of Error.

I.

The District Court erred in admitting Government's Exhibits 3, 4, 5 and 6.

II.

The District Court erred in admitting testimony of the witness Loud respecting an alleged conversation with Appellant.

III.

The District Court erred in denying Appellant's motions for a judgment of acquittal on each and every count of the Information.

IV.

The District Court erred in permitting the Ass't. United States Attorney to call upon Appellant, while he was on the witness stand, to produce private papers and in compelling Appellant to produce as evidence his private papers, to wit: Government's Exhibits 40, 41, 42, 43 and 44.

V.

The District Court erred in refusing to admit the expert testimony of the witness, John B. Schnieder, relating to the available supply of sugar.

VI.

The District Court erred in giving Government's requested instruction 8.

VII.

The District Court erred in refusing to give Defendant's requested instruction 16.

VIII.

The District Court erred in refusing to give Defendant's requested instruction 22.

IX.

The District Court erred in refusing to give Defendant's requested instruction 26.

X.

The District Court erred in refusing to give Defendant's requested instruction 35.

XI.

The District Court erred in refusing to give Defendant's requested instruction 36.

XII.

The District Court erred in refusing to give Defendant's requested instruction 37.

XIII.

The District Court erred in refusing to give Defendant's requested instruction 39.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Admitting Government's Exhibits 3, 4, 5 and 6.

Exhibit No. 3 was the alleged ration check No. 148, dated July 1, 1946, to C & H Sugar Corp. for 80,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Company" [R. 209].

Exhibit No. 4 was the alleged ration check No. 146, dated July 1, 1946, to Holly Sugar Co. for 660,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Co." [R. 183].

Exhibit No. 5 was the alleged ration check No. 145, dated July 1, 1946, to Spreckles Sugar Co. for 30,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was printed in with pen "West Coast Supply Co." [R. 232].

Exhibit No. 6 was the alleged ration check No. 144, dated July 1, 1946, to Union Sugar Co. for 600,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Company" [R. 298].

The error complained of concerning these four Exhibits is treated under the one specification of error because they all raise similar questions of law.

The following occurred in raising objection to the admission in evidence of Exhibit 3 [R. 207-8]:

"Mr. Strong: At this time, your Honor, I offer in evidence Government's Exhibit 3 for identification which is the check.

Mr. Carr: I object to it on the ground, if the court please, no proper foundation has been laid, no knowledge, no evidence of any knowledge on the part of the West Coast Supply Company, no evidence as to who put on the printing 'West Coast Supply Company,' and it is inadmissible against either Paul Ziegler or the West Coast Supply Company until connected up; that the check indicates or at least has on the face of it a suspicion of alteration.

I object to it on the ground that the information does not state an offense and upon the further ground that the partnership cannot be guilty of an offense and, thereby, it is not admissible.

The Court: Will counsel point out the alteration to which he directs the court's attention?

Mr. Carr: I am contending that 'West Coast Supply Company' in typing, that there is no foundation for it, your Honor, and from the evidence heretofore placed in the record, plus the statement of counsel at the beginning of the trial that there was something questionable about the checks, and as far as the signature is concerned, I am basing my objection on that ground.

The Court: The check will be admitted against Paul J. Ziegler. It will not be admitted as evidence against the West Coast Supply Company" [R. 207-8].

The following occurred in raising objection to the admission in evidence of Exhibit 4 [R. 182].

"Mr. Carr: I want to object to it on all grounds that I have heretofore set forth. In addition to the other grounds I want to add that a partnership cannot be guilty of a criminal offense and furthermore that there has been an alteration of the check; that it is not a ration document within those various sections that I have heretofore pointed out to your Honor and has not been shown to be any authority whatso-

ever for the signature or name 'West Coast Supply Co.' to be on the check."

The following occurred in raising objection to the admission in evidence of Exhibit 5 [R. 231].

"Mr. Carr: I am objecting to it on many and varied grounds I have already set forth and particularly with reference to both defendants. First it is a partnership, and there is no knowledge shown at all nor authority for the name to be on there. There is the suspicion of alteration so far as the defendant Ziegler, Paul Ziegler, is concerned; that it is inadmissible as against him because, first of all, the information does not state an offense against him and that the posture of the evidence at this time is such that no offense can be stated against either of the defendants under any of the counts in the information."

The following occurred in raising objection to the admission in evidence of Exhibit 6 [R. 149, 150].

"Mr. Strong: I offer this check in evidence, your Honor, as Government's Exhibit 6.

Mr. Carr: I object on the ground that it has been altered. The testimony shows it has been altered. It is not binding on either the West Coast Supply Company or on Paul J. Ziegler; for the further reason that under the ration order, Third Revised Ration Order No. 3, it is not a check issued under paragraph (15) of section 24.1, also under paragraph (5), section 24.1, and paragraph (9) of section 24.1, all because, your Honor, first of all, it is not a ration check; it is not on an account, not drawn by a depositor on a ration account. It is wholly immaterial, collateral to all of the issues in this case.

The Court: The check reads 'Ration Check—The United States of America—Office of Price Administration—Transfer to the sugar ration bank account of Union Sugar Co.—600,000 pounds of sugar.'

With reference to the alteration, Mr. Carr, will

you direct the court's attention to what you claim is an alteration?

Mr. Carr: I direct the court's attention to the fact that the witness has testified that the name 'West Coast Supply Company' did not appear there at the time he received the check. Someone after delivering the check has altered the check by adding to it 'West Coast Supply Company.'

The ration order specifically prevents the transfer of a check after it is altered. May I refer your Honor to section 15.7, Revised Ration Order No. 3, which reads as follows:

'No check which has been altered . . . mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check . . .'

To-wit, this gentleman or his concern.

' . . . shall return it to the issuer with a request for a new check . . .'

And so on down to paragraph (h). I had better read the whole paragraph.

'(h) How altered and lost checks replaced. A depositor to whom an altered . . . mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement . . . may issue a new check. If he does so . . .'

Then it goes on to say what he must do to cancel it.

Now, very specifically under everyone of those definitions and regulations the check could not be passed. It was an altered check. If you add a name to a check you alter it.

Mr. Carr: I want to reiterate all of the objections I have heretofore made and specifically add to that that this check, by the testimony of the Government's own witnesses, has shown to have been altered in that 'West Coast Supply Company' was written in after the check was issued" [R. 297].

At the outset, objection was made to the introduction of Exhibits 3, 4, 5 and 6 and was followed by extensive argument in support of the objection [R. 82-98].

Respecting Exhibit 3, Moseley, a witness for the Government, testified on direct examination that he had never seen the Exhibit prior to the time that he was called as a witness [R. 194]. The witness, Neff, called by the Government, testified on direct examination that he didn't recall this ration check in particular [R. 197].

Respecting Exhibit 4, the Government witness Barry, after testifying on direct examination that it appeared on its face the same when he received it from Appellant as it did at the time it was presented in court, finally admitted on cross-examination that he telephoned the Appellant because the name "West Coast Supply Co." did not appear on the check [R. 168, 171-2]. On redirect examination, Barry claimed that the name West Coast Supply Company was added because the Appellant said it would be all right [R. 172].

Catherine Barry, a Government witness, testified in answer to a question as to whether she was the one who typed in the words "West Coast Supply Co." "Well, it is a long time to remember back to say whether I did or did not. I have added the firm name to checks when they have been missing. I could have done it to this. I think I probably did. If I did, I asked the firm or at least somebody I thought was the firm whether I could add 'West Coast Supply Co.'" [R. 187].

Respecting Exhibit 5, Smith, a witness for the Government, testified that he was shown the check the day before he appeared on the witness stand and he couldn't remember if he had ever seen it [R. 222].

Respecting Exhibit 6, Leland, a witness for the Government, on direct examination testified that the check did not have "West Coast Supply Co." on it when he received it from Appellant and he did not know who inserted the words on the check [R. 132].

Writings which have been altered without the consent of a party hereto are not admissible in evidence against that party. In the case of *United States v. McCain* (D. C., E. D., Pa.), 1 F. (2d) 985, the Defendants were charged with the illegal possession and sale of whiskey and of maintaining a nuisance. One Austin, a witness for the prosecution, testified he had bought whiskey from the Defendants. On cross-examination, Defendants produced and showed to Austin an information, under oath sworn to by him before a Justice of the Peace, which was identified as an information accompanying a return of the Magistrate to the Court certified by the Magistrate. Upon cross-examination, the witness, Austin, admitted his signature to the information. The record which was produced and identified by the clerk of the Court, was offered in evidence by the Defendant to show a prior acquittal of the Defendants for the same offense and to impeach the witness, Austin, as to his whereabouts on the day of the offense. Upon objection by the District Attorney, the Court excluded this record upon two grounds, one of which is pertinent, namely, the ground that said record had been altered by inserting a different date thereon and in changing the jurat of the Justice of the Peace. In supporting its decision in this regard, the Court used the following language at page 986 of the opinion:

"Upon the question of the exclusion of the altered affidavit and the return of the magistrate, the general

rule is that, where suspicion is raised as to the genuineness of an altered document, the party producing the document is bound to remove the suspicion by accounting for the alteration. *Smith v. United States*, 2 Wall. (69 U. S.) 219, 17 L. Ed. 788. The alteration was entirely apparent, and it was material because the paper was offered to prove a prior sworn admission by the witness Austin that on May 3, 1924, he purchased liquor of the defendants in Chester, thereby contradicting his testimony that he was not in Chester upon that date. When he was upon the witness stand, his attention was not called to that date, but merely to his signature, which he identified. Under these circumstances, I know of no rule of evidence which makes an apparent material alteration in a writing evidence, even if it is produced as a court record, unless the party producing it offers evidence to show that the alteration was made before the paper was signed. I am therefore not convinced that I was in error in excluding the evidence."

Where suspicion of alteration of an instrument is raised whether it be apparent on inspection, or is made so by extraneous evidence, the party producing the instrument is bound to remove the suspicion by accounting for the alteration. In the case of *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788, the case came before the Court on a Writ of Error to the Circuit Court of the United States for the Northern District of Illinois. It arose out of an action instituted by the United States on official bond of one Charles N. Pine, former U. S. Marshal. When the bond was offered in evidence, it appeared that the name

of one of the sureties had been erased. It appeared that the Appellant had never consented to the erasure. The document was admitted into evidence over objection of the Appellant. The Supreme Court held this ruling erroneous and that the document was inadmissible. At page 232 of the opinion the Court stated:

“General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. 1 Greenl. Ev., 564.”

The second ground of objection advanced by Appellant, that Exhibits 3, 4, 5 and 6 were not sugar ration checks because they were not issued on a sugar ration account by a depositor, is treated fully under Specification of Error IV, namely, the error assigned for denial of motions for a judgment of acquittal, and for that reason are not set out at this place.

SPECIFICATION OF ERROR II.

The District Court Erred in Admitting Testimony of the Witness Loud Respecting an Alleged Conversation With Appellant.

The witness, Loud, was called by the Government during the case in chief and testified that he was employed by the Office of Price Administration [R. 287]. Loud testified that he had a conversation with Appellant in the first week or ten days of February, 1946. The following occurred [R. 288-89]:

“Q. What was the purpose of this discussion with Mr. Ziegler?

Mr. Carr: I am going to object to this. The date shows it is in February, 1946, several months before any alleged charge in the information, your Honor.

Any discussion with this defendant at that time would certainly have no bearing on the issue in this case.

The Court: Unless to show knowledge of the regulation, is all.

Mr. Strong: And willfulness, your Honor.

The Court: That is the only part. That must be established by the Government.

Mr. Carr: Well, if that is the point—

The Court: Yes, if it goes further than that, I shall entertain a motion to strike because it is antecedent to the offense charged.

Mr. Carr: I think counsel should state his purpose on a thing like that.

Mr. Strong: Shall I approach the bench, your Honor?

The Court: No, it is not necessary. Proceed.

(Question read by the reporter.)

The Witness: To ascertain the amount of sugar the West Coast Supply Company had received and was receiving at that time.

Q. By Mr. Strong: During this conversation with Paul Ziegler was there anything said about over-drawing of the sugar ration account of the West Coast Supply Company? A. Yes, sir.

Mr. Carr: I object to this as being outside the issues charged in the information.

The Court: Yes, I do not believe that part of the testimony is competent, unless the defendant's attention was called to some particular regulation with reference to the sugar ration. * * *

Mr. Carr: Well, now, did you rule on my objection, your Honor?

The Court: Yes, I sustained that. I suggested to counsel that if there are any matters that pertain to bringing home to the defendants knowledge as to the regulations at that time, sugar rationing, and so forth, that that is admissible; but that would be a different offense. I do not say there was. Maybe there was not any offense at all. There is not any evidence that there was an offense prior to July 1, 1946, alleged in this information.

However, any knowledge or statement made with reference to regulations to the defendant at that time will be permitted.

Mr. Strong: May I be heard further?

The Court: Yes.

Mr. Strong: I should like to offer it for a more extended purpose.

I think that the knowledge of the regulations is presumed since they are published in the Federal Register. My purpose is to show willfulness on the part of this defendant.

The Court: Yes, certainly. I have already stated that.

Mr. Strong: I am sorry. I thought your Honor was restricting it.

The Court: Oh, no.

Q. By Mr. Strong: Did the defendant, Paul Ziegler, make any statement or indicate in any way how he intended to obtain sugar after his ration account had been depleted?

Mr. Carr: Now, just a moment. That is assuming something that is not in evidence, saying that after the ration account was depleted; secondly, it is inquiring as to a time that is far antecedent to this information, and it certainly is going to work to the prejudice of this defendant if we get off into collateral issues. Then we will have to determine whether he violated some other regulation, your Honor.

The Court: Let me make it clear again.

Any knowledge brought to the defendant with reference to the regulations, or anything that he said with reference to his attitude towards those regulations, is admissible. I am excluding any testimony at all with reference to an alleged overdraft or anything else that there might have been prior to July 1, 1946.

I think that that is very clear. The Government must show willfulness in this matter. All right.

Mr. Strong: What is your Honor's ruling?

The Court: Read it.

(Record read by the reporter.)

The Court: Does that clear it up?

Mr. Strong: I am sorry. I do not understand your Honor's ruling on the question because it is my purpose to show willfulness by language of the defendant at that time.

The Court: I said you could. Now, I shall keep repeating it, Mr. Strong, if you want me to.

Read it again to Mr. Strong.

(Record read by the reporter.)

The Court: Now, that is the statement: the Government must show willfulness. That is what you asked me, and I repeat it again:

Any evidence you have of willfulness will be admitted" [R. 289-91].

"Q. By Mr. Strong: Did the defendant Paul Ziegler make any statement or indicate in any way how, if in any manner, he intended to obtain sugar in the event that his account was depleted?

Mr. Carr: Well, now, that certainly is objected to upon the basis it is based on a contingency. There is no foundation showing any contingency existed. It is prior to the time of the information.

The Court: Give the conversation between yourself and Paul Ziegler" [R. 292].

"The Witness: Well, Mr. Ziegler informed us that he felt that the sugar rationing was going off and that he was going to get sugar one way or the other, and his allotment period in January was like other allotment periods: he was short of sugar, and inasmuch as the meat rationing and gasoline, processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory, he felt that the same would happen to sugar. And he was going to get it one way or the other.

We informed him that sugar rationing was not off and that anything he did contrary to the regulations would not be legal.

He replied that he was not going to be caught short and he was going to build up his inventory in case the sugar rationing went off, and he was going to be supplied with as much as he could possibly get" [R. 293].

If such a conversation occurred, as related by Loud, it appears that Appellant, at the time of the conversation, expressed a design or plan to obtain sugar. Prior to the introduction of this conversation, the prosecuting attorney had stated that it was introduced to show "willfulness." In the first place, it would appear that the conversation was actually irrelevant, and, secondly, it was highly prejudicial to Appellant as an attempt to show willfulness.

Defendants' statements of design or plan are often admitted in evidence by courts as circumstantial evidence that the defendant later committed the act specified in the design. Thus, Appellant's statement that he planned or designed to get sugar would be relevant circumstantial evidence that he later did try to obtain sugar.

However, the conversation between Loud and Appellant was not introduced to prove a subsequent act of obtaining sugar. Instead it was introduced to prove a *state of mind* alleged to exist at a later time when Appellant attempted to obtain sugar. Obviously, a statement of a plan to do a particular act, as get sugar, is irrelevant in proving the state of mind which existed at a later date when the attempt to get the sugar was consummated.

Although there is nothing in the alleged conversation between Loud and Appellant which can be definitely placed in the category of a plan or design to obtain sugar illegally, the jury would undoubtedly draw the inference that it did indicate a plan to obtain sugar illegally. As a matter of fact, from a logical standpoint, Loud, as special agent for the Office of Price Administration, probably would have been the last person to whom Appellant would have communicated a desire to obtain sugar illegally.

Thus, from a statement of intent to obtain sugar (without indicating the time or method), one cannot logically reach the conclusion that at a later date an intention existed to obtain sugar illegally or under different circumstances. This distinction, which is extremely important, was very succinctly stated by Wigmore in his treatise on Evidence, as follows:

Wigmore on Evidence, 3d Ed., §103 (3):

“(3) *Design or Intention, distinguished from Intent.* The probative feature of an intention or design is its direction forward to the accomplishment of a purpose by action. That is why it is relevant to show the later doing of the act. This is a different thing from intent, in the legal sense, *i. e.*, the state of mind which accompanies an act and imparts to it a criminal or innocent quality. The two things are as different as the design with which a man buys a good cigar and his state of mind later when he is smoking it. His plan is, when buying, to smoke it; later, when his design is being fulfilled, his smoking is accompanied by sentiments of comfort and self-satisfaction. But his design may be frustrated and yet the accompanying sentiments may be experienced; as, if he loses the cigar and a friend gives him another. Or his design may be carried out, but the sentiments not be experienced; as, if the cigar turns out to be a poor one. So, too, a person may design to write a document and this design is relevant to show that he did later write it; but his intent, while writing it, to make false representations depends on different considerations. Again, a person may design to take another’s property, and this design is relevant to show the subsequent taking; but whether the taking was under a claim of right or with felonious intent involves a different mental state.”

A case analogous to the instant situation, and one which applies the foregoing principle, is *Stevenson v. U. S.* (5 Cir.), 86 Fed. 106. There, defendant was charged with murder for having killed a deputy marshal. Evidence was admitted as to the declaration of the defendant made three months prior to the homicide that he "intended to kill the next deputy marshal that arrested him." The Court held that the evidence was improperly admitted, pointing out on page 110:

"The evidence of Mrs. Joe Paul with regard to the declarations of the defendant made some three months prior to the homicide was improperly admitted. It was too remote and general to have any legitimate bearing on the issues to be tried. The case does not show, nor even tend to show, that the deceased, Joe Gaines, acted as a deputy marshal, or that he was known to the plaintiff in error at any time as a deputy marshal, but rather tends to show—and that was the view of the trial judge—that Joe Gaines, in attempting to arrest the defendant prior to the homicide and afterwards at the homicide, was acting as a constable, and not as a deputy marshal."

See also:

Bird v. U. S., 180 U. S. 356, 45 L. Ed. 570.

The prosecuting attorney, in his closing argument, presented the jury with the inference that the intention expressed by the Appellant in the conversation with Loud was to obtain sugar illegally, a state of mind on the part of the Appellant which was not borne out by the actual testimony. This inference, drawn from irrelevant evidence, was highly prejudicial to Appellant and it could hardly be denied that the jury would be swayed by such evidence.

The prejudicial effect of Loud's testimony became more pronounced by the argument of the prosecutor. In his opening argument he said:

"Then you will remember Mr. Loud of the Office of Price Administration testified here something to the effect that Mr. Ziegler was up there on some matter and that Mr. Ziegler indicated to him that he was going to get sugar.

Mr. Ziegler said on the stand, No, he never said that.

But the fact of what he was doing completely belies his own statement because it is exactly what he was doing all the time. He was trying to get sugar, and that is what he was after all the time: to get sugar. That is why he issued these four pieces of paper: to get sugar, not to just pass documents from one hand to another" [R. 542-43].

In his closing argument the prosecutor said:

"As a matter of fact, in this case we have much more convincing proof that it was done because the thing that Mr. Loud said Mr. Ziegler had told him he was going to do, to try to get sugar any way he could, isn't that exactly what he did in this case? Isn't that exactly what he was trying to do throughout May and June, 1946? And isn't that precisely what he ultimately did when he issued these documents over which there is a dispute, apparently, as to whether they are pieces of paper or checks?

Why did he issue these documents if it was not to get sugar? Was he not trying to get sugar all the time? Wasn't he trying to get it any way he could? And isn't that exactly what Mr. Loud said the defendant told him he was going to do?

I don't see any reason why it should be assumed that Mr. Loud is not telling the truth in view of all those circumstances and in view of the fact that Mr. Loud is a person who has no direct interest in this case" [R. 598-99].

The insidious effect of this argument becomes apparent. Although this evidence was not introduced to prove the fact that the Appellant had obtained sugar, but, according to the prosecutor, for the purpose of showing willfulness, here now the prosecutor is arguing that Appellant had told Loud that he was going to get sugar and that Appellant did just exactly that. The prosecutor also argued that Appellant was trying to get sugar throughout May and June, 1946, which is wholly contrary to the evidence. The only testimony concerning negotiation for sugar was that of Appellant, and it was unrefuted that he talked to the various brokers during May and June and had told them that he wanted to be ready to acquire sugar should O. P. A. be terminated [R. 156, 345].

In the first place, the statement attributed to Appellant that "he was going to get sugar one way or the other" leaves entirely too much for interpretation. The prosecutor's approach was that this statement, made approximately five months prior to the alleged offense, meant that Appellant was going to obtain sugar illegally. The alleged statement of Appellant is subject to various interpretations and the most reasonable interpretation is not necessarily the one that it disclosed any desire to obtain sugar illegally.

Even assuming that the statement attributed to Appellant by Loud contained an inference of an illegal desire

to obtain sugar, its relevancy is relatively remote. The process of inference from a mental condition at one time, unrelated to any particular act, to a mental condition at another time under different circumstances (the changed situation including the Presidential veto of the O. P. A.) with respect to a particular act, is extremely remote. Here the argument is from a mental condition supposedly once existing to its subsequent prolongation. The peculiar opportunity for error here is that the alleged prior existing emotion may have been brought to an end by a change in the facts (which was the situation in the instant case) before the time in issue, and the subsequent existing emotion at the time of the alleged criminal act may have been first produced at the time of the alleged offenses, namely, July 1.

The conversation with Loud from which the Government desires to infer a mental condition on the part of the Appellant occurred in February, many months before the acts in question and before the all-important veto of the O. P. A. by the President. If this conversation was relevant at all, and that is challenged, to prove mental condition, its relevancy certainly was so remote as to be completely outweighed by the undue prejudice which it created in the minds of the jury against Appellant.

The disadvantageous and prejudicial effect of such testimony as that produced by Loud falls within the two descriptions of Professor Wigmore, Vol. VI, 3d Ed., Sec. 1864 (a), p. 490:

“If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal—*i.e.*, the jurors—by diverting their attention from the real issue and fixing it upon a trivial or minor

matter, or by making the controversy so intricate that the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable.

“(b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.”

The testimony of the witness Loud and the references thereto by the prosecutor in his argument made it impossible for the jury to give appropriate and proper consideration to Appellant's defense that he honestly believed that the O. P. A. had terminated on June 30 and that on July 1, the date of the alleged offense, he was entitled to purchase sugar in a free market. In other words, the very foundation of Appellant's defense was so completely confused as to leave no hope for a verdict of the jury based solely on the evidence in the case.

SPECIFICATION OF ERROR III.

The District Court Erred in Denying Appellant's Motions for a Judgment of Acquittal on Each and Every Count of the Information.

At the conclusion of the Government's case in chief, the following occurred:

"Mr. Carr: If the court please, there are various matters I want to take up.

First I want to move under Rule 29 of the Rules of Criminal Procedure for the court to order an entry of judgment of acquittal on each and every count of the information as to both defendants, the West Coast Supply Company and Paul J. Ziegler.

Perhaps the order in which I take these up may save some time, your Honor.

The Court: How much time would you like, Mr. Carr? * * *

The Court: Proceed.

Mr. Carr: Now, first I want to take up the information itself, your Honor, and the grounds of that motion are simply this:

First, under Rule 12(b)(2), the Rules of Criminal Procedure, provides that the court may at any time take notice of and dispose of the failure or any or every count that charges an offense.

The second proposition is that the evidence is insufficient to sustain a conviction on any of the counts against either one of these defendants" [R. 311, 312].

Thereafter, beginning on p. 312 of the record and continuing to p. 328, is set forth the argument in support of the motion.

At the conclusion of the case of Appellant, the motion for judgment of acquittal was renewed [R. 425].

At the conclusion of the entire case, the following occurred:

“Mr. Carr: Yes. Your Honor’s ruling is that the judgment of acquittal is now ordered entered in the case of the West Coast Supply Company on each and every count?”

The Court: That is correct.

Mr. Carr: So then I shall address myself to the matter of Paul J. Ziegler.

Now, if the court please, I want, even if I have to presume a little upon the court’s time, to very vigorously and as strongly as I can direct the court’s attention to the proposition to which I am going to address myself.

First I will move that the court enter a judgment of acquittal on each and every count of the information, to-wit, eight counts, insofar as the remaining defendant, Paul J. Ziegler, is concerned, based upon the grounds:

First, that the information does not state an offense;

Secondly, that there has been a complete variance of the proof with the allegations of each and every count of the information;

Third, that the evidence is wholly insufficient to support a verdict of guilty on any of the eight counts of the information” [K. 443].

At the outset, it would appear that Counts Three and Four should have been summarily disposed of on the motion for the reason that, at all times mentioned in Counts Three and Four, there was an actual balance in the accounts of the West Coast Supply Company in the amount of 34,717 pounds [Exhibit 1]. The Government, however, contended that the check in the amount of 600,000 pounds [Exhibit 6], drawn to the Union Sugar Co., had

arrived at the bank first and thereby created an overdraft. Under this theory, a larger check than the balance arriving ahead of another check would supposedly deplete the account although a demand would be made upon the depositor for ration credits, and, if not supplied, the entire amount of the check first arriving would be entered as an overdraft. An analogous situation is presented where a depositor has in an account \$10,000 and on the same day issues two checks—one for \$12,000 and one for \$5,000. In the event the bank refused payment of the \$12,000 check, it certainly would not be contended that the bank would reject payment of the \$5,000 check. It seems basically sound to assert, assuming Appellant had actually been a depositor and had issued a check on the account, that he would be entitled to absorb the entire 34,717 pounds before being charged with an overdraft.

The second ground urged in support of the motion for a judgment of acquittal was that there had been a fatal variance between the charges in each of the counts and the proof. In Counts One, Three, Five and Seven, it was clearly intended to charge an overdraft on the ration account of the West Coast Supply Company. Specifically, it was charged as to each check that defendants did wilfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn by issuing to the Union Sugar Co. a check, drawn by and on behalf of the West Coast Supply Company and Ziegler, when the West Coast Supply Company had a balance at the Union Bank & Trust Co. in its accounts insufficient to cover the amount of the check.

Section 15.7 (d) of Third Revised Ration Order No. 3, specifically provides:

“(d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Under the foregoing quoted section, the proof required to sustain a violation would be that a ration check was issued for an amount larger than the balance in the ration account on which it was drawn.

Section 24.1 (c) (5) of Third Revised Ration Order No. 3 defines check as:

“‘Check’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.”

The record contains no evidence whatsoever that Appellant was a depositor—in fact, the evidence conclusively shows that he was not.

Section 24.1 (c) (9) defines depositor as:

“‘Depositor’ means a person who has a ration bank account. * * *”

Section 24.1 (c) (1) defines account as:

“‘Account’ means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits.”

There was no evidence that Appellant had, at any of the times mentioned in any of the Counts of the Information, a ration bank account. On the contrary, the evidence definitely disclosed that he had no such account, nor was he a depositor.

Section 24.1 (c) (15) defines issue as:

“‘Issue’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.”

The evidence produced by the Government discloses that Exhibits 3, 4, 5 and 6 were not, in fact, completed, but, on the contrary, were altered after they were delivered by Appellant to the various brokers.

It should be noted that Section 15.7 (f) of Revised Ration Order No. 3 states:

“No check which has been altered, * * * may be issued, * * *.”

The District Court entered a judgment of acquittal as to the West Coast Supply Company, and that Company had the ration account, not the Appellant. If the checks in question were not issued by or on behalf of the West Coast Supply Company, then certainly they were not ration checks on the account of the West Coast Supply Company, and, if they were not checks on that account, they were, in fact, nothing but pieces of worthless paper in so far as Section 15.7 (d) is concerned.

In so far as Counts One, Three, Five and Seven are concerned, the Government charged that the West Coast Supply Company and Appellant had issued ration checks against the account of the West Coast Supply Company and that those checks resulted in overdrafts. The proof, however, was a complete variance with the charge and disclosed that actually Exhibits 3, 4, 5 and 6, while being signed by Appellant, were not drawn on the account of the West Coast Supply Company either by that Company or on its behalf. Otherwise the lower court, upon its stated theory that a partnership might be criminally liable, would have refused to enter a judgment of acquittal.

The situation here would be no different from one where it was charged that a check on a bank account was an overdraft and it developed that the name in which the account was carried was placed on the check after it was issued and without the knowledge or consent of the depositor. It is unlikely that it would be contended that such a transaction constitutes an overdraft no matter how many other offenses might be involved.

It is contended by Appellant that there was a material variance between the charges in Counts Two, Four, Six

and Eight and the proof. In each of the counts it was charged that Appellant and West Coast Supply Company unlawfully received sugar in exchange for a ration check drawn by and on behalf of Appellant and West Coast Supply Company on the Union Bank & Trust Co. and "issued by the defendants" when they knew that the rationed documents were not validly issued because the West Coast Supply Company did not have a ration bank account with sufficient balance to cover the respective checks. There was a material variance between these charges and the proof in two particulars— namely, the Government proved that the West Coast Supply Company actually received the sugar (not Appellant), and it completely failed to prove that the ration checks were issued on the ration account of the West Coast Supply Company.

The Government introduced in evidence Exhibits 12 through 21, both inclusive, to establish that the sugar was actually delivered to the West Coast Supply Company.

Exhibit 12 consisted of invoices to the West Coast Supply Company for sugar [R. 134]. Exhibit 13 consisted of freight bills showing the transfer of sugar to the West Coast Supply Company [R. 135]. Exhibit 14 consisted of delivery receipts showing delivery of sugar to the same Company [R. 135]. Exhibit 15 consisted of four documents showing shipment and delivery of sugar to West Coast Supply Company [R. 159]. Exhibits 16 through 20, both inclusive, were original and photostatic copies of documents showing the transfer of sugar to the West Coast Supply Company [R. 161]. The witness, Robert A. Russell, called by the Government, testified that he was employed by the West Coast Supply Company. He identified his signature on the above mentioned Exhibits [R. 257 *et seq.*]. All Exhibits introduced by the Government relating to delivery of the sugar show delivery to West Coast Supply Company. The only evidence of delivery to any one other than West Coast Supply Com-

pany was the one statement by the witness Russell. When testifying concerning Exhibit 15-A, he stated that that particular sugar he received in the entrance of the warehouse of the John H. Ziegler Co. [R. 255]. Appellant did attempt to testify on direct examination that the John H. Ziegler Co. paid for the sugar, but counsel for the Government objected and the Court sustained the objection on the ground that the checks would be the best evidence. Thereafter Government counsel demanded the checks of Appellant while he was on the stand in his behalf and they were introduced in evidence over the objection of Appellant [R. 384 *et seq.*].

In the case of *Berger v. U. S.*, 295 U. S. 78-89, 79 L. Ed. 1314, the rule for the determination of whether there is a variance in the proof is set forth at p. 1318.

“The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.”

In *Neal v. U. S.* (8 Cir.) 102 F. (2d) 643, the indictment informed the defendant that the Government would prove that the \$5,903 was a part of that stolen after August 24, 1937, and not that it might be a part of that taken some time during the preceding seven years. The Court reversed the case holding that the variance was material pointing out there would have to have been a different defense if the allegation had been that the money was taken afterwards.

So, in the instant case, Appellant was charged in the odd-numbered counts with an overdraft and came to court prepared to defend on those charges. Counsel for the Government seemed to take the position that, if the facts

developed any offense under Third Revised Ration Order No. 3 or General Ration Order No. 8, Appellant should be found guilty. No principle of criminal law is more firmly established than the principle that one cannot be convicted of an offense not charged in the Information or the Indictment.

Malaga v. U. S. (1 Cir.), 57 F. (2d) 822. Furthermore, it is fundamental that material parts of which constitute the offense must be stated in the indictment or information and they must be proved by the evidence.

Mathews v. U. S. (8 Cir.), 15 F. (2d) 139, 142-3;
U. S. v. Byers (2 Cir.), 73 F. (2d) 419.

Respecting the even-numbered counts, Appellant came to court prepared to meet the charge that he had received the sugar alleged in Counts Two, Four, Six and Eight, for checks on the account of the West Coast Supply Company as set forth therein. At the end of the Government's case, when the motion for the judgment of acquittal was first made on each count, there was no evidence whatsoever that appellant had received any sugar. On the contrary, all of the evidence conclusively showed that it was received by the West Coast Supply Company. The Court, at that particular time, refused to grant the motion not only as to Appellant but as to the West Coast Supply Company. At the end of the entire case, the Court granted the motion as to West Coast Supply Company and the jury returned a verdict on the even-numbered counts—that is, the receiving of the sugar, against Appellant. The evidence also disclosed that the alleged ration checks, Exhibits 3, 4, 5 and 6, were, in fact, not issued on the account of the West Coast Supply Company as charged in the even-numbered counts. It, therefore, appeared at the end of the Government's case and at the conclusion of the case for the defense that there had been a material variance in the particulars as heretofore set out.

Another one of the grounds urged in support of the motion for judgment of acquittal was that the quota base provisions of Third Revised Ration Order No. 3 are made dependent upon historical use in administering the sugar rationing program, and that such restrictions are expressly prohibited by the War Mobilization and Reconversion Act of 1944 (50 U. S. C. A., App., Sec. 1651 *et seq.*) and are invalid [R. 317-8].

The evidence discloses that the John H. Ziegler Co. was an industrial user [R. 362]. However, the Company did not come into existence until 1944 [R. 337]. The business was that of manufacturing jams, jellies, doughnut flour, flavors, extracts and glazed fruits [R. 333]. The Company employed in June and July of 1946 approximately 20 people [R. 335].

Any manufacturer (industrial user) who began operation of business after 1941 encountered extreme difficulty in obtaining sugar by reason of not having a base period in that year. Under Third Revised Ration Order No. 3, such a manufacturer's quota was predicated upon a historical basis or otherwise it was dependent upon the concern's existence at a given time.

The War Mobilization and Reconversion Act of 1944, Sec. 1658 (b) provides:

"Such production for nonwar use shall be permitted regardless * * *, and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time;" Section 1659, U. S. C. A., Title 50, App. provides:

"(a) Whenever the expansion, resumption, or initiation of production for nonwar use is authorized, on a restricted basis, by any executive agency having control over manpower, production, or materials, the restrictions imposed shall not be such as to prevent any small plant capable and desirous of participating in such expansion, resumption, or initiation of pro-

duction for nonwar use from so participating in such production.

“(b) Whenever such executive agency allocates available materials for the production of any item or group of items for nonwar use, it shall make available a percentage of such materials for the exclusive use by small plants for the production of such item or group of items. Such percentage shall be determined by the head of such agency after giving full consideration to the claims presented by the chairman of the board of directors of the Smaller War Plants Corporation and shall be fair and equitable.

“(c) * * * For the purposes of this title (sections 1656-1660 of this Appendix), a small plant means any small business concern engaged primarily in production or manufacturing either employing two hundred and fifty wage earners or less, or coming within such other categories as may be established by the head of such executive agency in consultation with the chairman of the board of directors of the Smaller War Plants Corporation. * * *

Appellant, as an industrial user, was entitled to an allotment which was just, fair and reasonable because he was a small plant capable and desirous of participating in expansion or initiation of production for nonwar use. The program denying this, namely, Third Revised Ration Order No. 3, was, therefore, invalid as to him as was held in *Fleming v. Moberly Milk Products Co.* (D. C., Cir.), 160 F. (2d) 259. The lower court (69 F. Supp. 776) in its opinion (p. 777) stated:

“The Congress saw fit to encourage small enterprises and new plants and to protect same in the expansion and initiation of production for non-war use. To further such Congressional purpose statutory safeguards were set up to protect small plants and new concerns from discriminatory use of historical use bases for any purpose in ration orders.”

SPECIFICATION OF ERROR IV.

The District Court Erred in Permitting the Ass't. United States Attorney to Call Upon Appellant, While He Was on the Witness Stand, to Produce Private Papers and in Compelling Appellant to Produce as Evidence His Private Papers, To Wit: Government's Exhibits 40, 41, 42, 43 and 44.

Appellant took the stand and testified in his own behalf [R. 333]. During the time that Appellant was under cross examination by Government's counsel, the permissible limits of such an examination were overstepped constantly and eventually reached a histrionic climax with a demand upon Appellant, while under cross examination, to produce his private papers.

The situation developed in the following way. At the close of the Government's case, all of the testimony introduced by the Government proved that the sugar involved was delivered to the West Coast Supply Company. As heretofore pointed out, there was insufficient evidence during the case in chief to prove that Appellant was a member of the partnership, West Coast Supply Company, or that he had received any of the sugar mentioned in any of the Counts. Despite this, as heretofore mentioned, the Court denied the motion for a judgment of acquittal both as to Appellant and the West Coast Supply Company as to each and every Count.

All of the sugar involved had actually been delivered by July 12, 1946 [R. 354]. However, the Government introduced various Exhibits dated after July 12, 1946, which tended to show the transportation of the sugar from warehouses where it was being held for the West Coast Supply Company to the plant of the West Coast Supply Company. Count Two charged receipt of sugar from about July 3, 1946, to about August 17, 1946, and Count Six from about July 1, 1946, to about August 30, 1946.

It became material to establish when the actual delivery of the sugar took place. Thereupon, during his direct examination, Appellant identified and introduced in evidence Exhibit F, which was a check from the John H. Ziegler Co. to the Union Sugar Company in payment for 6,000 sacks of sugar [R. 355-6].

The following occurred:

“Q. By Mr. Strong: Thank you, sir. I don’t see here any of the other checks used in payment for the transactions involving the 30,000 pounds of sugar which was sold by the Spreckels Sugar Company in connection with which the piece of paper marked Government’s Exhibit 5 was given, nor the check, money check, covering the other two transactions of 660,000 pounds and 80,000 pounds.

I ask you whether the cash checks were in the same form as this Defendants’ Exhibit F? A. If it would be of any help to you, Mr. Strong, the checks are here in court.

Mr. Strong: May I see them?

Mr. Carr: Just a moment. I will decide that. I am the counsel in the case.

Mr. Strong: I am sorry. May I see them?

Mr. Carr: No.

Mr. Strong: I call upon the defendant for the production of the three checks.

Mr. Carr: Now, I cite that as error to call upon the defendant upon the stand to produce any evidence in this case, and I ask your Honor to instruct the jury that he is not compelled to produce any evidence, except that which he desires to produce.

The Court: In other words, on cross examination?

Mr. Carr: No, your Honor, he is not compelled to produce anything.

The Court: Oh, yes. When a witness is on the

stand, Mr. Carr, the Government is entitled to cross examine him on any matters that pertain to the issue.

Mr. Carr: Does your Honor order me to produce the checks?

The Court: Yes.

Mr. Carr: I will produce them, but I want it understood it is over my objection.

The Court: That is right. Let the record so show.

Mr. Carr: I might add to that, on the further ground that it might tend to incriminate or bring other and collateral offenses into this case which are not charged in the information.

The Court: That is personal privilege.

I instruct the witness at this time, in view of the statement of counsel, that if you feel, Mr. Ziegler, that the production of these instruments might tend—not 'do' at all—might tend to incriminate you, you have the right to refuse to answer and the court will deny the request of the Government to produce the documents.

Mr. Strong: I think it will save time if I withdraw the request, your Honor. I would rather withdraw it.

Mr. Carr: Then I am going to move at this time that the court instruct the jury to disregard the whole incident. Counsel for the Government should not have asked for them if he did not want them.

This business of making a play of asking for them and very touchingly giving up the request I don't think is a proper approach.

Mr. Strong: May I have the checks, your Honor?

The Court: Produce the checks.

(Brief pause in the proceedings.)

Mr. Carr: Do you find them?

The Witness: Yes.

Mr. Carr: May I pick up the rest of those?

The Court: Yes.

Mr. Carr: Just take the checks off.

(Brief pause in the proceedings.)

Q. By Mr. Strong: Do you now have the checks,
Mr. Ziegler A. Yes.

Q. May I see them? A. (Handing documents
to counsel.)

Mr. Strong: May the record show that the witness is handing me the checks?

I should like to have them marked first before we say anything.

The Witness: All right.

Mr. Strong: May I have these checks marked for identification, each one a separate Government exhibit?

The Court: Look at the dates and try to get them in order by dates.

The Clerk: The first check will be Government's Exhibit No. 40 for identification, and that is dated July 5, 1946.

The next check is Government's Exhibit No. 41 for identification, and that is dated July 8th, 1946.

The next Government's Exhibit is No. 42 for identification, and that check is dated July 11, 1946.

The next check is Government's Exhibit No. 43, and that is dated July 11, 1946.

And the next check is Government's Exhibit No. 44 for identification, and that is dated July 11, 1946" [R. 381-4].

Mr. Strong: At this time, your Honor, I should like to offer in evidence Government's Exhibits 40, 41, 42, 43 and 44 which are the money checks.

Mr. Carr: I am going to object to those. I have heretofore objected on the ground that the defendant was called upon to produce them when he was not

required to, and they were produced under order of the court over the objection of counsel for the defendant.

The Court: Overruled. In evidence.

The Clerk: Government's Exhibits 40 to 44, inclusive, in evidence" [R. 394].

Exhibits 40 through 44, both inclusive, were checks drawn by the John H. Ziegler Company, signed by Appellant, Paul J. Ziegler, and were in payment for the sugar mentioned in the various Counts of the Information [R. 395 *et seq.*].

Appellant was compelled to produce these five checks which tended to prove that the John H. Ziegler Company, a Company in which he was a partner, had paid for the sugar referred to in Counts THREE, FOUR, FIVE, SIX, SEVEN and EIGHT. Appellant's signature was affixed to the checks. Thus, during cross-examination, he was, by order of the Court, compelled to produce evidence against himself. It should be kept in mind that, up to this point, the evidence produced by the Government tended to prove that the sugar in question had been purchased by and delivered to the West Coast Supply Company.

The lower court appeared to think that, because Appellant had elected to introduce one of his checks, namely, Defendants' Exhibit F, he was thereby subject on order to produce the remainder of his checks which were private papers. Apparently the Court's ruling was based upon the theory that any matter opened on direct examination would force Appellant to produce his private papers concerning such matter upon demand by the Government. It is well settled, of course, that a witness, including a defendant who takes the stand in his own behalf, may be cross-examined on all matters which he opens in his direct examination. It is also as well settled that, in the federal courts, the cross-examination of a witness is limited to matters embraced in his examination in chief. *Alpin v. U. S.*, 9 Cir., 41 F. (2d) 495.

The rule is the same in civil or criminal cases. *Tucker v. U. S.*, 8 Cir., 5 F. (2d) 818.

In a criminal case, the defendant waives his privilege of silence upon the subjects relative to which he testifies, but upon no other. *Harrold v. Territory of Oklahoma*, 8 Cir., 169 Fed. 47, 51.

The order to produce private papers is in no way involved in the principles of law above set forth. The question is whether or not the defendant has been compelled, contrary to his constitutional privilege under the Fifth Amendment of the Constitution, namely, that he shall not be compelled in any criminal case to be a witness against himself, and, under the Fourth Amendment, his immunity to unreasonable search and seizure. In *Boyd v. U. S.*, 116 U. S. 616, the court held that there could be no compulsory production of a man's private papers to establish a criminal charge against him because of the Fourth and Fifth Amendments.

The case of *McKnight v. United States* (6 Cir.), 115 Fed. 972, is the leading case concerning the right of a District Attorney to call upon a defendant to produce documents. The case was decided in 1902 and has been followed since that time by many other courts. A Government witness on the prosecution's case testified on direct examination in a criminal case that the original agreement between him and defendant was last seen by him in the defendant's possession. The district attorney then offered in evidence a copy of this agreement. Objection was made by defendant's counsel. After further evidence that the witness saw the original agreement in the hands of the defendant, the district attorney asked the witness to read the copy in evidence. The court stated: "Now, if the district attorney chooses, he can demand the production of that paper." The district attorney did so, directing his demand to the defendant. Defendant's counsel objected to the demand. The court then stated: "Is

it produced, or is it desired to produce it, by the defendant?" The defendant's counsel then denied the right of the district attorney to make the demand.

On appeal the following error was urged: That the court permitted the defendant to be called upon to produce the paper in open court upon trial before a jury.

In holding that this was a violation of his constitutional rights, the court stated at page 980:

"As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so. The court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. * * *

"In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before a jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this pro-

cedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution.”

Lisansky v. U. S. (4 Cir.), 31 F. (2d) 846, 850:

“The books were shown to be in possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. *Boyd v. U. S.*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. And it was not permissible for the government even to lay the foundation for the introduction of copies of the books, as in civil cases, by making demand for their production in open court, or by introducing in evidence notice of such demand. *McKnight v. U. S.* (C. C. A. 6th), 115 F. 972, 981. But evidence as to the contents of books and papers is not lost to the government because the defendant has them in his possession and their production cannot be ordered on the usual basis laid for the introduction of secondary evidence. In such cases, the rule is that, when they are traced to his possession, the government, without more ado, may offer secondary evidence of their contents.”

See also:

O'Shea v. U. S. (6 Cir.), 93 F. (2d) 169;

Watlington v. U. S. (8 Cir.), 233 Fed. 247;

Savage v. U. S. (8 Cir.), 270 Fed. 14;

Eddington v. U. S. (8 Cir.), 24 F. (2d) 50;

U. S. v. Kempe (D. C. N. D. Ia.), 59 Fed. Supp. 905;

Heller v. U. S. (4 Cir.), 104 F. (2d) 446;

Hilliard v. U. S. (4 Cir.), 121 F. (2d) 992.

The only case which appears to question the rule is that of *U. S. v. Buckner* (2 Cir.), 108 F. (2d) 921. However, in that case the defendant's counsel produced the

documents upon the request of the prosecutor and without order of the court. Furthermore, the defendant made no objection.

If the cross-examination of a witness is restricted to what is opened in chief, and the rule is certainly not less stringent as to a defendant in a criminal case, then a contention that a defendant may waive his constitutional privilege against self-incrimination and the compulsory production of private papers finds no support in the decisions of the courts and wholly lacks persuasive quality. On many occasions, the attorneys for the government have, during the cross-examination of a government agent, strenuously objected to a request that the agent produce his notes upon the ground that such notes were confidential despite the fact that the witness had testified to matters after refreshing his recollection from his notes. The decisions generally hold that such objections may be sustained.

Upon what basis may the foregoing principle be justified and yet at the same time insistence be made that a defendant may be deprived of his constitutional rights under both the Fourth and Fifth Amendments because he has taken the witness stand in his own behalf, and, in fact, as in the instant case, has not so much as referred to the documents which were demanded of him?

The demand for the documents was made during a cross-examination in which the Appellant had been questioned about other possible offenses, had been warned in the presence of the jury both by the prosecutor and the court that he need not testify if his testimony might tend to incriminate him, and, in general, subjected to cross-examination not within permissible limits. Upon what theory the government will predicate such conduct is not known, for it appears that such a demand was in violation of the constitutional rights of the Appellant.

SPECIFICATION OF ERROR V.

The District Court Erred in Refusing to Admit the Expert Testimony of the Witness, John B. Schnieder, Relating to the Available Supply of Sugar.

The Appellant called as a witness John B. Schnieder, an economic consultant specializing in agriculture, and the following occurred:

“Q. Now, I ask you to ascertain for me and for presentation to the jury and the court for the year 1946 from official documents—and you can specify what those documents are—the available supply of sugar for consumption in the United States in 1946?”

Mr. Strong: I object to that, your Honor. I don't think it makes the slightest bit of difference.

The Court: I shall hear Mr. Carr on it.

Mr. Carr: Well, my point is simply this, your Honor: that we are going to offer this testimony to show that on July 1, 1946, there was no emergency, to-wit, therefore, no authority for the rationing of sugar and that instead of there being a scarcity of sugar there was ample supply in the country and, therefore, no authority for the rationing program in so far as the Third Revised Ration Order No. 3 is concerned, and also in connection with our argument to do with reconversion. [R. 410-11.]

The Court: * * *

I am going to sustain the objection of the Government, and I am going to ask Mr. Carr in the absence of the jury to make an offer of proof because I regard this question new and very important. [R. 420.]

Mr. Carr: And I am now just making the offer of proof as follows:

That the requirements are based upon a 1935-39 average per capita consumption on 96.5 pounds of

refined sugar for a population of 139,028,300. That figure—

The Court: What is the per capita, Mr. Carr?

Mr. Carr: 139,028,300. That evidence would show that it was arrived at by a computation, taking the official statistics for 1946 but scaling it down just slightly to try to be absolutely accurate.

The requirements based on that 1935-39 average per capita of raw sugar was 7,173,860 tons. Reduced to refined sugar, it was 6,708,115 tons.

On a per capita percentage basis, the requirements of raw sugar were 103.2 pounds per person; on a refined basis, 96.5 pounds per person.

In 1946 the actual consumption of raw sugar was 5,645,913 pounds.

The refined actual consumption, that is, tons—and I am speaking with reference to short tons—was 5,276,554 tons; actual consumption per capita, raw, 81.2 pounds per person; actual consumption on a refined basis, 75.9 pounds per person.

We offer to prove that the evidence will show as to raw sugar not used of the total, which we will call a deficit, was 1,527,947 tons.

As refined sugar that would show that there was, in addition to actual consumption, or a deficit, 1,431,561 tons, as per capita there was 22 pounds of raw sugar which was not used, available but not used.

Of the refined sugar there was 20.6 pounds per capita on the same basis. That is the refined.

Now, the controlled coupon sugar allocated to other countries but controlled by the United States was 1,619,000 pounds—that is raw—and 1,513,084 pounds refined. That represents 23.3 per capita, that is, on a pound basis in raw sugar; and 21.8 pounds per person on a refined sugar basis.

Now, adding those figures that I have just read to the actual consumption, which was on raw sugar, 5,645,913 tons, you get a total of 7,264,913 tons of raw sugar which were available. On the refined basis you add the above figure of actual consumption heretofore given of 5,276,554 tons, and you get a total of 6,789,638 tons which was available for consumption.

On a per capita basis you add the same percentage in the same way; your Honor; and on a raw basis you show available for consumption 104.5 pounds per person.

You show on a refined basis there was available 97.7 pounds per capita.

Now, just one further break-down and we have finished.

If you add the U. S. consumption and the U. S. controlled coupon sugar, you have a total of 7,264,913 pounds which gives you a total available to the United States of 7,577,424 tons—that last statement should have been tons of raw sugar.

The Court: Tons for both?

Mr. Carr: Yes.

The Court: All right.

Mr. Carr: And if you add the refined tons on the same basis, that is, 6,789,638, you get a total tonnage of refined sugar available in 1946 of 7,081,705 tons. And if you add your percentages, you find that you have available per capita in the United States in 1946 109 pounds of sugar per person, that is, raw, or on a refined basis you have 101.9 pounds of refined sugar available per person.

These figures were based upon data taken from the 1945 Agricultural Statistics, Bureau of Agricultural Economics of the United States Department of Agriculture, page 93; and all of the facts or all of the data would be submitted as having been obtained from the official journals or departmental, I suppose, reports by the Bureau of Foreign and Domestic Commerce and the United States Department of Commerce and the Agricultural Department.

I do not think I need designate each one of those.

So that the proof, we would hope to present, would be to the effect that while there was only 75.9 pounds per person used in the United States in 1946, there was actually available 101.9 pounds, showing that there was no actual shortage of sugar." [R. 421-23.]

The power to ration sugar is predicated upon the Second War Powers Act, 50 U. S. C. A. App., 633, Sec. 2(a)(2):

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The power, therefore, under the Act to allocate materials is based upon an emergency existing at the time it was passed. It is well settled that emergency legislation of this type falls when the emergency upon which it was

based has passed and no longer exists. The United States Supreme Court has so held.

Chastleton et al. v. Sinclair, et al., 1924, 68 Law. Ed. 841. (This case involved rent control brought on by conditions created by World War I.)

At page 843 the Supreme Court stated:

“We repeat what was stated in *Block v. Hirsh*, 256 U. S. 135, 154, 65 L. ed. 865, 870, 16 A. L. R. 165, 41 Sup. Ct. Rep. 458, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. (Cases cited.)

“The order, although retrospective, was passed some time after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power. It is conceivable that, as is shown in an affidavit at-

tached to the bill, extensive activity in building has added to the ease of finding an abode. If about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiffs' allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end."

The proffered testimony would have shown that there was no actual shortage of sugar during 1946 in the United States. Therefore, no power existed under the Second War Powers Act to ration that commodity. It will be noted that the section above quoted giving the President the power provides that the President must be satisfied "that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply
* * *."

It would appear to follow that, if there were no shortage, the power to ration sugar no longer existed.

SPECIFICATION OF ERROR VI.

The District Court Erred in Giving Government's Requested Instruction 8.

"The law does not require that the defendant have actual knowledge of the provisions of the Second War Powers Act of 1942, of General Ration Order No. 8, or the Third Revised Ration Order No. 3, governing the rationing of sugar. All persons, including those who use or deal in sugar, are charged by law with notice of the statute and ration orders and their contents because of publication in the Federal Register, a daily official Government publication which is available to all persons.

"The statute which makes the mere publication of a law or regulation in the Federal Register constructive notice of its contents to every person also contains a provision to the effect that such publication of a document creates a rebuttable presumption that the document was duly issued, prescribed, promulgated, filed."

This instruction completely disregarded the major part of Appellant's defense, namely, lack of intent. It, in effect, advised the jury that they should find the Appellant guilty irrespective of whether he had actual knowledge of the ration orders upon which the counts of the Indictment were predicated. As will hereinafter appear under Specifications of Error VIII and XII, Appellant points out that he was acting upon the premise that, by the termination of O. P. A., he believed sugar rationing ended, and that he did not know of the existence of Executive Order 9745. Therefore, he did not intentionally commit the alleged violations. Since this argument is developed fully under Specifications of Error VIII and XII, reference is made to those arguments and they are adopted as if set forth at this place.

SPECIFICATION OF ERROR VII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 16.

"Defendants' Requested Instruction No. 16.

You are instructed that the word 'issue,' within the meaning of each count of the Information, means the delivery of a completed sugar ration check to the person to whose account the check is made payable; and that no check which has been altered may be issued. Even though you may be convinced, beyond a reasonable doubt, that defendant, Paul J. Ziegler, in fact, signed his name to the various sugar ration checks alleged in the Information, you are instructed that defendant, Paul J. Ziegler, could not have issued or caused said checks to have been issued if you find that they were altered by anyone other than the defendant prior to, at the time of or after delivery to the person to whose account the checks were made payable.

Third Revised Ration Order No. 3, Sec. 24-1 (c)
(15).

Third Revised Ration Order No. 3, Sec. 15.7 (f)
(1).

Third Revised Ration Order No. 3, Sec. 15.7 (f)
(2).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 22].

A material part of the charges was that a sugar ration check was issued by Appellant and which was an overdraft on the account of the West Coast Supply Company. One of the grounds advanced for the motion for a judgment of acquittal was that there had been a variance in that the four checks on which the charges were predicated had been altered. However, the Court denied this. There should have been no disagreement as to the facts on this point,

but the prosecutor did not see fit to concede that there had been an alteration of the checks. Therefore, the jury had to decide whether the name, West Coast Supply Company, had been placed on the checks by Appellant or by some other person. If placed upon the checks by someone other than Appellant, the jury would necessarily have to be advised as to the legal effect of such a finding in order that they might reach a verdict according to law.

If the jury had determined that the name West Coast Supply Company was not upon the checks when they were delivered by Appellant to the various brokers and that thereafter someone added that name to the checks, it would appear to follow without question that the checks were not issued upon the account of the West Coast Supply Company. Furthermore, there would have been an alteration of the checks—particularly as defined by Sec. 15.7 (f) of Third Revised Ration Order No. 3.

The information charges that Appellant issued the various checks; yet the Court, in denying Defendants' Requested Instruction No. 16, refused to instruct the jury as to the meaning of the word "issue" which is defined in Sec. 24.1 (c) (15) as the delivery of a completed check. If the evidence did not sustain the charge that Appellant issued the checks as defined by the foregoing section, then the jury would have been obliged to acquit him. The jury was left to speculate on the applicable law when they should have been told that they must find that the Appellant wilfully issued, within the meaning heretofore mentioned, a sugar ration check in an amount larger than the balance in the account of the West Coast Supply Company before they could convict. The charges, of course, required that the jury find that the checks had been issued on that account. Otherwise it would have had to acquit on the particular charges involved irrespective of the fact that the proof may have shown violations of other sections of Third Revised Ration Order No. 3.

SPECIFICATION OF ERROR VIII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 22.

"Defendants' Requested Instruction No. 22.

You are further instructed in this connection that, upon publication of an Executive Order of this kind in the Federal Register, the law of the United States creates a presumption that all persons affected by the order have knowledge of such order, which presumption is a rebuttable one. If, therefore, you find beyond a reasonable doubt that the acts and things of which defendants are accused of doing were done by said defendants, and if you further find that, at the time said acts and things were done by said defendants, they did not know that the President had signed Executive Order No. 9745 and were unaware that sugar rationing had continued beyond June 30, 1946, then you must find that the presumption of notice of said Executive Order No. 9745 to defendants has been rebutted.

Title 44, U. S. C. A., Sec. 307.

Flannagan v. United States, 1944, C. C. A. 9, 145 F. (2d) 740.

Kempe v. United States, 1945, C. C. A. 8, 151 F. (2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 26-27].

The Second War Powers Act, 50 U. S. C. A. App., Sec. 633, provides:

"(5) Any person who wilfully performs any act prohibited, * * * by any provision of this subsection (a) or any rule, regulation or order thereunder, * * * shall be guilty of a misdemeanor.
* * *

There can be no question that the offenses charged in each of the counts of the Information required, among other things, that the Government prove that the appellant wilfully committed the acts charged.

It was a part of Appellant's defense that he acted in good faith in purchasing the sugar believing that sugar rationing had actually come to an end. The evidence showed that he did not learn until the end of July or the first of August, 1946, of the existence of Executive Order 9745, which extended the power of O. P. A. to continue a rationing program [R. 352]. This was after all of the sugar involved had been paid for and delivered.

As heretofore pointed out, Appellant had discussed with various brokers the matter of obtaining sugar upon the termination of the rationing program indicating to the brokers that, from his observation of the debate taking place in Congress, he thought there was a strong likelihood of Congress refusing to extend the program. It was Appellant's contention that, when the President vetoed the Act of Congress extending the O. P. A., he naturally concluded that that terminated sugar rationing.

The Government contends that Appellant did not have to have actual knowledge of Executive Order 9745, which was filed for publication in the Federal Register on July 1, 1946, at 10:32 a. m. [Exhibit F, R. 350-2]. This is the same morning that the purchases of sugar were made by Appellant.

There can be no dispute that publication in the Federal Register does give constructive notice. However, as was pointed out in *Yakus v. U. S.* (321 U. S. 414), 88 L. Ed. 834, p. 854:

"The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 USCA §307, 9A FCA title 44, §307. The penal provisions of the statute

are applicable only to violations of a regulation which are wilful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue."

In *Flannagan v. U. S.* (9 Cir.), 145 F. (2d) 740, this Court clearly indicated that, where a person is charged with a violation of a regulation published in the Federal Register, such publication creates a rebuttable presumption of notice to him, but that he is entitled to show lack of actual knowledge of the regulation to establish lack of wilfulness. This Court, on page 741, said:

"Appellant is charged with knowledge of the maximum price fixed by Regulation 169, since on June 9, 1943, prior to the sale, the regulation, as amended and to take effect on June 19th, was published in the Federal Register. Such publication created a rebuttable presumption of notice to appellant. 44 U. S. C. A., §307. It also appears that instead of rebutting the presumption, the appellant had actual knowledge. He charged in his bills at this time for sides of beef the amount of $24\frac{1}{4}\phi$ per pound, of which charge he said that to the best of his knowledge it was the ceiling price at which he was allowed to sell."

To the same effect:

Kempe v. U. S. (8 Cir.), 151 F. (2d) 680, 684.

Violation of rationing orders must be wilful.

Zimberg v. U. S. (1 Cir.), 141 F. (2d) 132, 137;

U. S. v. Fish, Inc. (2 Cir.), 154 F. (2d) 798, 801;

U. S. v. Renken (D. C., S. C.), 55 Fed. Supp. 1, 3.

The Court, at the request of the Government, instructed the jury that the termination of the Emergency Price Control Act had no effect upon sugar rationing since such was empowered under the Second War Powers Act [R. 624]. The Court also instructed the jury that at all times mate-

rial to the case the O. P. A. was the agency given the power to ration sugar, and it did so [R. 623]. The jury was further instructed that the law did not require that defendant have actual knowledge of the provisions of either Third Revised Ration Order No. 3 or General Ration Order No. 8; that all persons who dealt in sugar are charged by law with notice of ration orders because of the publication of the orders in the Federal Register [R. 626].

An important phase of the Appellant's defense, which was not covered by the Court's instructions, was the claim of Appellant that he believed that sugar rationing had ended because O. P. A. had terminated; that he had no notice of Executive Order 9745 continuing O. P. A. and therefore the violation, if any, was not wilful. Had the President not promulgated that Executive Order, the O. P. A. would not have had any power to continue sugar rationing irrespective of whether some other agency might have had such power. Thus, the Appellant claimed that he was acting upon the theory that, if O. P. A. was actually at an end, then sugar rationing must also be at an end.

In refusing to give Defendants' Requested Instruction No. 22, the Court's instructions had the effect of telling the jury, at least impliedly, to disregard Appellant's claim that he had not acted wilfully. The jury would also conclude that the Court meant to inform it that, since the filing of Executive Order 9745 with the Federal Register, Appellant had actual knowledge of the continuation of the functioning of O. P. A. in connection with sugar rationing. In other words, the Court, in refusing Defendant's Requested Instruction No. 22, disregarded the proposition that goes to the very heart of Appellant's contention of lack of intent, namely, that he honestly believed that sugar rationing no longer existed after the President's veto on June 30, and that he acted in good faith in purchasing the sugar without knowledge that the President had issued the Executive Order.

SPECIFICATION OF ERROR IX.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 26.

"Defendants' Requested Instruction No. 26.

If, from all of the evidence, you should conclude that the name West Coast Supply Company was not placed upon Exhibit 6, which is the check set forth in count 1; Exhibit 5, which is the check set forth in count 3; Exhibit 4, which is the check set forth in count 5; and Exhibit 3, which is the check set forth in count 7, by the defendant Paul J. Ziegler, then you must find that said check or checks is not a ration check as defined by Sec. 24.1 of the Third Revised Ration Order No. 3. In order to be a ration check, such check must be drawn by a depositor against his account and the evidence in this case discloses that Paul J. Ziegler was not a depositor.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 30].

This instruction relates to the odd-numbered counts which charge offenses under Sec. 15.7 (d); that is, issuing a check on a specific account when the balance was insufficient to cover the check. That was the offense charged and no other. In order to be overdrafts on the account of the West Coast Supply Company, as charged, the checks had to be drawn on that account. If not drawn on that account, the checks could not be overdrafts on that account. Furthermore, if they were not drawn on any ration account, then they could not be overdrafts at all.

The evidence was conclusive that Appellant had no ration account, so the checks were either drawn on the West Coast Supply Company's account, as charged, or they were not. Appellant contended that the evidence produced by the Government was not only insufficient to estab-

lish that the checks were drawn on the account of the West Coast Supply Company, but, on the contrary, the proof that the name West Coast Supply Company had been added was sufficient to warrant a judgment of acquittal. Since the Court denied that motion and put the case to the jury, it would appear that the jury would have to consider the claim of Appellant that the name West Coast Supply Company was added to the checks and decide whether or not he placed the name there. If the jury found that he did not, then the jury should have been instructed as to the effect of such a finding as a matter of law. In other words, the applicable law to such a finding was necessary to permit the jury to arrive at a verdict in accordance with both the evidence and the law.

Nowhere in the instructions given is there found anything which tells the jury the legal effect of an alteration of the checks. The Court merely gave definitions as follows:

“Definitions: ‘[Check]’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

I charge that that ‘alteration’ means a change in the terms of a written instrument by a party entitled thereunder, without the consent of the other party, by which its meaning or language is changed” [R. 624].

“‘[Issue]’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable” [R. 628].

Defendants’ Requested Instruction No. 26 would have informed the jury what to do if it found the checks were altered. Merely telling the jury the meaning of the words “Check,” “Alteration” and “Issue” without more would

hardly appear to be a complete, full and adequate instruction on a vital phase of the case.

A recitation of definitions to a jury is indeed a dangerous substitute for a direct and clear explanation of the applicable principles of law. The requested instruction would have supplied that explanation and avoided a situation which was prejudicial to Appellant's defense.

SPECIFICATION OF ERROR X.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 35.

“Defendants' Requested Instruction No. 35.

Paragraph (f), Sec. 15.7 of Third Revised Ration Order No. 3 provides that no check which has been altered may be issued, transferred or deposited, and that a person who holds such a check shall return it to the issuer. Although the defendant, Paul J. Ziegler, may have signed his name to the various alleged sugar ration checks set forth in the Information, in order for you to find that he issued the checks within the meaning of Third Revised Ration Order No. 3, the evidence must convince you that the checks were not altered by anyone after delivery of the checks by Paul Ziegler.

Third Revised Ration Order No. 3, Sec. 15.7 (f).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:.....” [R. 35].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error VII, and is here adopted without repeating it at this place.

SPECIFICATION OF ERROR XI.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 36.

"Defendants' Requested Instruction No. 36.

Sec. 24.1 (c) (5) of Third Revised Ration Order No. 3 provides:

'[Check] means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.'

Paragraph 9 of the same section provides:

'[Depositor] means a person who has a ration bank account. * * *'

It is a material part of the charge in counts 1, 3, 5 and 7 that defendant, Paul J. Ziegler, issued a sugar ration check, or checks. In order for the Government to sustain the proof respecting this material ingredient, it is necessary that the checks referred to in each count not only be signed by Paul J. Ziegler, but the proof must show that they were drawn by him as a depositor against his account.

Unless you find beyond a reasonable doubt that he was a depositor and the checks were drawn against his account, you must acquit on those counts.

Third Revised Ration Order No. 3, Sec. 24.1 (c) (5).

Third Revised Ration Order No. 3, Sec. 24.1 (c) (9).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 36].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error IX, and is here adopted without repeating it at this place.

SPECIFICATION OF ERROR XII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 37.

“Defendants’ Requested Instruction No. 37.

On June 29, 1946, the President of the United States vetoed the bill passed by Congress which would have extended the Emergency Price Control Act of 1942, and on June 30, 1946, that Act terminated and was no longer law. On June 30, 1946, all powers derived by the Office of Price Administration from the Emergency Price Control Act of 1942 terminated. On June 30, 1946, President Truman promulgated and signed Executive Order No. 9745 which provided that the Office of Price Administration was directed to continue to exercise all powers and functions which did not terminate by reason of the termination of the Emergency Price Control Act and such powers that were delegated to the O. P. A. pursuant to the Second War Powers Act.

While this Executive Order was signed by the President on June 30, 1946, it was not filed with the Division of Federal Register, Washington, D. C., as required by statute, until July 1, 1946, at 10:32 a. m., and was not published in the Federal Register until July 2, 1946.

Title 50, U. S. C. A., Sec. 966.

92nd Congressional Record 8092.

11 F. R. 7327.

79th Congress, Second Session, Chapter 671, Public Law 548.

Given:.....

Refused: J. F. T. O’C., J.

Given as Modified:.....” [R. 37].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error VIII, and is here adopted without repeating it at this place.

The court gave the Government's requested instruction No. 4 which advised the jury that:

“* * * The termination on July 1, 1946, of the Emergency Price Control Act of 1942 had no effect upon sugar rationing, since sugar rationing was in effect under the Second War Powers Act, which did not terminate.

“I further instruct you that on June 30, 1946, the President of the United States issued an Executive Order by which he continued in effect the Office of Price Administration as the enforcement agent for that purpose. This the President had the right to do.”

This, of course, may have been literally true, but the refusal to give Defendant's requested Instruction No. 37 undoubtedly lead the jury to conclude that the court meant that Appellant's contention concerning a lack of wilfulness was not to be considered under the evidence.

It was a vital part of Appellant's defense that the termination of the Emergency Price Control Act caused him to believe that all powers of the O. P. A. terminated and sugar rationing ended. As a matter of fact, all powers of O. P. A. derived from the Emergency Price Control Act did terminate and it was necessary for the President to issue Executive Order 9745 to continue the powers of O. P. A. as to rationing. Now, if Appellant did not have knowledge of Executive Order 9745 at the time of the alleged offenses, and there was unrefuted evidence that he did not, then his defense of lack of wilfulness was an issue for the jury irrespective of the fact that sugar rationing may have continued.

The jury was told in effect that the termination of the Emergency Price Control Act had no effect on sugar rationing; that the President had issued an Executive Order 9745 [R. 624] and that

“The law does not require that the defendant have actual knowledge * * *. All persons, * * * are charged by law with notice of the statute and ration orders * * * because of publication in the Federal Register, * * * which is available to all persons” [R. 626].

This was extremely prejudicial to Appellant because, in refusing to give Defendant's requested instruction No. 37, the jury was not told that the powers of O. P. A., under the Emergency Price Control Act, did terminate and that Executive Order 9745, which was necessary to continue the sugar rationing powers of O. P. A., was not filed until July 1, 1946, at 10:32 a. m. and was not published until July 2, 1946, the day after all sugar was purchased. The jury should have been so instructed so that these matters could have been considered in connection with Appellant's defense of lack of wilfulness.

SPECIFICATION OF ERROR XIII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 39.

"Defendants' Requested Instruction No. 39.

One of the specific ingredients of the offense charged in each and every count of the Information is that of wilful intent to do the acts charged. While under the Federal Register Act the filing of an Executive Order creates a rebuttable presumption of notice to the defendant, the defendant may rebut the presumption that he had actual knowledge of the Executive Order.

If you find that the acts and things of which defendant is accused of doing were done by him, and you further find that, at the time said acts and things were done by the defendant, he did not have knowledge that Executive Order 9745 had been signed by the President, and he did not know that sugar rationing had been continued beyond June 30, 1946, then you should find that the presumption of notice of said Executive Order 9745 to defendant has been rebutted.

Title 44, U. S. C. A., Sec. 307.

Flannagan v. United States, 1944, C. C. A. 9, 145 F. (2d) 740.

Kempe v. United States, 1945, C. C. A. 8, 161 F. (2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 38-9].

The argument which would be made in support of this point is substantially the same as that made in support of Specifications of Error VIII and XII, and is here adopted without repeating it at this place.

Conclusion.

Many of the errors assigned have not been argued in the interest of saving both time and expense. However, it is respectfully submitted that the Specifications of Error treated in this brief disclose that Appellant was not convicted upon the charges laid in the Information and upon competent evidence. It is, therefore, respectfully urged that the matters presented herein warrant this court in setting aside the conviction of Appellant on each and every count.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

APPENDIX.

Second War Powers Act.

50 U. S. C. A. App. Sec. 633 (2).

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

THIRD REVISED RATION ORDER No. 3.

"Sec. 15.7. *Issuance and use of checks*— (a) *When check to be issued.* A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this order authorizing the account on which the check is drawn, except as otherwise provided in section 15.8 (d) of this order.

"(b) *How checks are issued.* Each check and its stub must be completely filled out before the check may be issued, but a check register, duplicate voucher or any similar record may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued,

the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

“(c) *Post-dated checks prohibited.* No person may issue or transfer a check before the date it bears.

“(d) *Overdrafts prohibited.* No check may be issued for an amount large than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.

“(e) *What checks to be certified.* Only checks which are surrendered to the Office of Price Administration by primary distributors when they file their periodic reports are to be certified or confirmed.

“(f) *Altered or mutilated checks.* (1) No check which has been altered (except as authorized in subparagraph (2) of this paragraph), mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check shall return it to the issuer with a request for a new check. If he is unable to locate the issuer, or to obtain a new check from him, he shall deliver the check to the District Office, with a statement of all the circumstances.

“(2) Checks and their stubs may be altered only by banks before delivering them to depositors and by issuers before or at the time of issuing them, and only to the extent of changing the name of the commodity (for example, from processed foods to sugar) and where necessary, the unit designation (for example, from points to pounds); and checks so altered may be issued, transferred and deposited.

“(g) *Lost checks.* A person who loses or unintentionally destroys a check issued or transferred to him,

or from whom such a check is stolen, shall notify the issuer in writing of the circumstances of the loss or destruction and request that a new check be issued to him. If he is unable to locate the issuer, or to obtain a new check from him, he shall send the district office a statement signed by him of all the circumstances.

“(h) *How altered and lost checks replaced.* A depositor to whom an altered (except as authorized in subparagraph (2) of paragraph (f) of this section), mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement of a lost, destroyed, or stolen check issued by him, may issue a new check. If he does so, he must enter on the stub or other record used in place of the stub or other record used in place of the stub of the original check the fact that it has been lost, stolen, altered, mutilated, partially or completely destroyed, and on the stub or other record of the new check the fact that it replaces the original check. Every depositor shall immediately send his bank a written description of any checks drawn on his account and lost or stolen before deposit, and a description of any checks issued to replace them.

“(i) *Non-depositors may transfer checks.* A person who is not a depositor and is not required to be one, to whom a check is properly issued or transferred, may transfer it to any person for any purpose for which other evidences may be transferred under Revised General Ration Order 5 or this order authorizing the account on which the check is drawn. He must endorse the check before transferring it.

* * * * *

ARTICLE XXIV—DEFINITIONS.

“Sec. 24.1. *Meaning of terms used in this order.* (a) Whenever the provisions of this order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the person owning such establishment or registering unit with respect thereto. Whenever reference is made to an act done or to be done, or to property owned, by an establishment or a registering unit, it shall be deemed to refer to an act done or to be done, or to property owned, by the person owning such establishment or unit in its behalf.

“(b) Words importing the masculine gender include the feminine and neuter genders; and words importing the singular include the plural and vice versa.”

“(c) Definitions:

“(1) ‘Account’ means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits.

* * * * *

“(5) ‘Check’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

* * * * *

“(8) ‘Delivery’ means the transfer of physical possession or the transfer of a document of title.

“(9) ‘Depositor’ means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts.

* * * * *

“(13) ‘Industrial user’ means any ‘person’ who has an ‘industrial user establishment.’ ‘Industrial user estab-

lishment' means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers. It also includes any establishment (except an establishment at which sugar is used only for educational purposes under the direction of the Department of Agriculture or the Extension Service of the Department of Agriculture) at which sugar is used for experimental, education, testing, or demonstration puposes, whether or not a product resulting from such uses is to be used in the preparation or service of foods or beverages which the establishment or its owner serves to consumers. An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases.

* * * * *

“(15) ‘Issue’ when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.

* * * * *

“(18) ‘Ration credits’ means the credits in an account reflecting deposits of stamps, coupons or checks.

“(19) ‘Ration evidence’ or ‘evidences’ means checks, coupons, and stamps.”

GENERAL RATION ORDER No. 8.

“Sec. 2.9. *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it.”

CHRONOLOGY OF LEGISLATIVE AND EXECUTIVE ACTS
UPON WHICH SUGAR RATIONING PROGRAM IS PRE-
DICATED.

Sugar Act of 1937, 50 Stat. 1100 (Title 7, U. S. C., Sec. 1100);

Priorities Act of 1940, Section 2(a)—War and Defense Contracts Act of June 28, 1940 (Title 50, U. S. C. A. App., Section 1152 (2) (c));

Executive Order No. 8629, January 7, 1941 (6 F. R. 119);

Executive Order No. 8734, April 11, 1941 (6 F. R. 1917);

Executive Order No. 8875, August 28, 1941 (6 F. R. 4483);

First War Powers Act of 1941 (Title 50, U. S. C. A. App., Section 601);

Executive Order No. 9024, January 16, 1942 (7 F. R. 329);

Emergency Price Control Act of 1942 (Title 50, U. S. C. A. App., Section 901);

Executive Order No. 9040, January 24, 1942 (7 F. R. 529);

War Production Directive I, January 24, 1942;

Executive Order No. 9069, February 23, 1942 (7 F. R. 1409);

Second War Powers Act of 1942 (Title 50, U. S. C. A. App., Section 633);

Executive Order No. 9125, April 7, 1942 (7 F. R. 2719);

Presidential Proclamation No. 2551, April 15, 1942 (7 F. R. 2826);

General Ration Order No. 8, April 15, 1942;

War Production Supplementary Directive No. IE, April 21, 1942 (7 F. R. 2965);

Ration Order No. 3, April 21, 1942 (7 F. R. 2967);

Executive Order No. 9280, December 5, 1942 (7 F. R. 10179);

Food Directive No. 3, February 15, 1943 (8 F. R. 2005), Redesignated War Food Order No. 56 (8 F. R. 4319);

Executive Order No. 9315, March 15, 1943 (8 F. R. 3279);

Executive Order No. 9322, March 26, 1943 (8 F. R. 3807);

Executive Order No. 9334, April 19, 1943 (8 F. R. 5423);

War Food Order No. 64, May 26, 1943 (8 F. R. 7093);

Executive Order No. 9577, June 30, 1945 (11 F. R. 8087);

Third Revised Ration Order No. 3, as amended January 1, 1946 (11 F. R. 134);

Presidential Veto of HR 6042, June 29, 1946 (92nd Congressional Record 8092);

Executive Order No. 9745, June 30, 1946, Filed July 1, 1946 at 10:32 a. m. (11 F. R. 7327);

Emergency Price Control Act of 1942, as amended, and Stabilization Act of 1942, as amended (Title 50, U. S. C. A. App., Section 966);

Price Control Extension Act of 1946, July 25, 1946 (79th Congress, Second Session, Chapter 671, Pub. Law 548).

No. 11555

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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MAY 22 1948

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PAUL J. ZIEGLER,

Appellant,

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APPELLEE'S BRIEF.

JURISDICTIONAL STATEMENT.

Appellant was indicted under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. Sec. 633, *et seq.*) the Second War Powers Act of 1942; General Ration Order No. 8 and the Third Revised Ration Order No. 3. The District Court had jurisdiction under the Second War Powers Act of 1942, Sec. 301. The offenses charged were committed in the Southern District of California [R. 2-8]. Judgment was entered on February 11, 1947 [R. 41, 641]. Notice of appeal was filed on February 25, 1947 [R. 46-7] This Court has jurisdiction under Section 128 of the Judicial Code as amended (28 U. S. C. A. Sec. 225).

STATUTES AND REGULATIONS INVOLVED.

The Statutes and Regulations involved in this case are set forth in the Appendix to appellant's opening brief.

STATEMENT OF THE CASE.

On December 31, 1946, an eight count Information was filed in the United States District Court for the Southern District of California, Central Division, against appellant and the West Coast Supply Company [R. 2-8].¹ Counts One, Three, Five and Seven each charged that appellant and the West Coast Supply Company wilfully and unlawfully issued and caused to be issued a sugar ration check upon a ration account in the Union Bank and Trust Company for an amount larger than the balance in the account on which it was drawn [R. 2, 4, 5 and 7]. Counts Two, Four, Six and Eight each charged that appellant and the West Coast Supply Company wilfully and unlawfully received a certain designated quantity of sugar, a rationed commodity, in exchange for a sugar ration check issued by the defendants when they knew and had reason to believe that the ration document was not validly issued because the sugar ration bank account did not have a sufficient balance to cover the check at the time that it was issued [R. 3, 4, 6, 8].

The sugar referred to in the even numbered counts was that obtained by virtue of the issuance of the checks

¹The references preceded by "R" are to the Record on Appeal and those preceded by "A. B." are to appellant's brief.

alleged to have been illegally issued in the odd numbered counts.

On January 20, 1947, motions of defendants to dismiss the Information were denied [R. 9], and each of the defendants entered pleas of not guilty to each of the eight counts of the Information [R. 10]. On February 4, 1947, a motion by the Government to amend each count of the Information in certain particulars, was granted by the District Court [R. 10, 11. See also R. 3, 8].

From February 4 to February 11, 1947, appellant and defendant West Coast Supply Company were tried before the Honorable J. F. T. O'Connor, and a jury [R. 11]. At the conclusion of both the Government's and the defendants' cases, the trial Judge granted a motion for a directed verdict of acquittal as to the defendant West Coast Supply Company on all counts of the Information [R. 12], and denied a similar motion as to the defendant Paul J. Ziegler, appellant here [R. 12].

The jury then found appellant guilty on each of the eight counts of the Information [R. 41].

Thereafter the Court sentenced appellant to imprisonment for three months on each of the eight counts of the Information, the sentences to run concurrently on all counts, fined him \$2,500 on each count [R. 43-45], and then suspended the jail sentence and placed appellant on probation for sixty days on each count, to run concurrently [R. 44-45].

STATEMENT OF FACTS.

Preliminary.

The "Summary of Facts" set forth in appellant's brief (A. B. 4-6), as well as other reference in that brief to evidence taken at the trial, does not set forth the evidence most favorable to the Government, which alone will be considered on appeal.²

Appellant, an attorney in this State, a former O. P. A. ration board member, is disclosed by the evidence to have engaged in one of the grossest and most brazen violations of Federal laws to have come to the attention of the authorities in this District. Utilizing a preconceived scheme and carefully and deliberately prepared plan for obtaining sugar during a period when it was rationed by law to provide its most effective utilization in a war period, appellant lied and falsified documents and caused others, at times unknowingly, to take steps which would effectuate appellant's illegal purposes.

As a result of his machinations, an authorized sugar ration balance of less than 40,000 pounds was deliberately misused by appellant in such a way as to permit him to obtain illegally for himself, and others associated with him in business ventures utilizing sugar, a total of more than 1,300,000 pounds of sugar [R. 79-80].

In the circumstances disclosed by this record, the sentence meted out to appellant was relatively mild, and neither it, nor his conviction should in any way be disturbed.

²See *Hemphill v. United States*, 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627.

The Facts Most Favorable to the Government.

In the main, the facts most favorable to the Government were not contradicted by appellant, his primary defense consisting of an attempt to avoid responsibility by highly technical defenses and unacceptable explanations of his acts. In brief, the facts are these:

Appellant is an attorney [R. 333-334], and was once a member of an O. P. A. ration board [R. 122]. For some years past, appellant has been more interested in sugar and sugar products than in the practice of law [R. 333-334]. In that connection, appellant with his father, John H. Ziegler, since February 1, 1944, constituted the co-partnership known as John H. Ziegler Company [R. 333], while appellant's father and brothers, and possibly also appellant [R. 145, 147], were, since at least February, 1943, partners operating under the name of West Coast Supply Company [R. 333. See also R. 181].

The John H. Ziegler Company purportedly manufactured jellies, flavors, extracts, and other items utilizing sugar as a major ingredient [R. 333], which functions prior to February 1, 1944, were a part of the operations of the West Coast Supply Company [R. 335]. The John Ziegler Company then purportedly sold the manufactured products to the West Coast Supply Company which re-sold them to the wholesaler [R. 344-345]. Sugar requirements for these operations were about 47,500 pounds a day [R. 336]. Both businesses operated upon the same continuous physical premises [R. 337], and appellant did work for both concerns [R. 286, 360-363]. It is not clear where the activities of each of these concerns ended and the other began with reference to the business of preparing and of selling jams, jellies and allied products.

Appellant's primary function on behalf of both these companies was to devote himself to governmental regulations and laws affecting the business in which they were engaged [R. 335, 361. See also R. 73-74].

West Coast Supply Company had an official sugar quota and also a sugar ration account since March 17, 1943, at the Union Bank and Trust Company, and appellant's signature was one of the authorized signatures against that account [Gov. Ex. 2]. The John H. Ziegler Company had no sugar quota [R. 336, 362]. However, appellant bought sugar for the latter (and appellant's counsel intimated at the trial that questions as to these facts might expose other offenses and compel appellant to testify against himself) [R. 361-363. See also R. 373-382].

In June, 1946, appellant says, he followed closely the Congressional progress of the bills to extend the Emergency Price Control Act [R. 345-349], and consulted sugar brokers as to sugar supplies in the event rationing ended [R. 155-156, 345-349].

Prior to July 1, 1946, appellant admittedly had sought to obtain increased sugar quotas from the Office of Price Administration, and in order to succeed in these endeavors, he had deliberately described himself on legal forms which indicated on their face that falsification of any fact was a federal offense, which he filed with that agency, as a "partner" of the West Coast Supply Company, whereas in truth, according to appellant's admission on the stand he was not then such a partner [R. 244-245, 372-378, 401-409]. Appellant's explanation of this action can best be appreciated only by a direct reading of the record by this Court [R. 403-409].

In February, 1946, appellant told officials of the Office of Price Administration [R. 293] that he “felt that sugar rationing was going off” and that he was “going to get sugar one way or the other”, that he was “short of sugar”. Appellant further stated that “inasmuch as the meat rationing and gasoline, processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory,” he felt that the same would happen to sugar. And he was going to get it one way or the other (*ibid.*).

On July 1, 1946, appellant purchased about 1,300,000 lbs. of sugar by telephone from various concerns [R. 126, 349, 391]. For this sugar he issued the four sugar ration checks involved in this case [R. 66-70, 349-351]. The sugar was billed, sent to, and accepted by the West Coast Supply Company [R. 133-135, 148-149, 159-162, 391].

The only sugar ration account on which appellant could draw was that of the West Coast Supply Company [R. 367].

The sugar was paid for in money by four checks drawn on the John H. Ziegler Company and signed by appellant [R. 355, 385-390]. Three of these checks indicate on their face that they were “In payment of . . . West Coast Supply Company” [R. 379, 381, 387, 393].

As to the four ration checks, appellant admitted at the trial that he signed all four of these checks [R. 340-343, 344, 370-373, 82], but denied that any of them bore the words “West Coast Supply Company” above his signature at the time he issued them [R. 340-343, 344, 370-373].

More fully, what occurred on July 1, 1946 was this:

When appellant sought to place an order for 600,000 lbs. of sugar with Mailliard & Schmiddel through its official Leland at about 10 A. M. on July 1, Leland read to appellant a telegram which he had received, to the effect in part that sugar rationing was being continued in full force and effect [R. 125-129], and informed appellant that a ration check for the 600,000 lbs. would be required of him [R. 130]. Appellant replied that "the O. P. A." was out of existence [R. 157], but he nevertheless agreed to furnish the check [R. 130, 157-158], and did so that afternoon [R. 130-132, 158]. This check bore appellant's signature, but not the name of the West Coast Supply Company [R. 132, 149]. The latter was later inserted. The 600,000 lbs. of sugar was delivered to the West Coast Supply Company upon orders of appellant, and was accepted by it [R. 133-135, 148-149].

That day appellant also ordered, by telephone, an additional 660,000 lbs. of sugar from Parrott & Company, through its official Barry [R. 165-166], and next day that concern received a ration check for that number of pounds signed by appellant but not bearing the words "West Coast Supply Company" [R. 167-169]. A telephone call was then made to appellant, and he authorized the addition of those words to the check [R. 172-173, 183].

The sugar was shipped to the West Coast Supply Company and accepted by it [R. 185-187].

On July 1, appellant ordered an additional 80,000 pounds of sugar, over the telephone, on behalf of West

Coast Supply Company, from the Sims-Thompson Company [R. 192-193]. In placing the order appellant gave No. 148 as the number of a ration check covering the purchase, which check was actually issued by him for 80,000 lbs. and was subsequently received, complete in all details, by that concern [R. 194, 197-198, 207, 209, 215].

Finally, on July 1, appellant ordered a further 30,000 lbs. of sugar from the Kelley-Clarke Company through its employee Williams [R. 220-226] and, it received from him ration check No. 145 in that amount [R. 226, 232].

At the trial appellant admitted that, as to the 660,000 pounds check, Barry called him and stated that it did not carry "the name of the account on it." Appellant admits that he replied to Barry: "So what?"; that Barry said "Well, it should have an account name on it, shouldn't it?"; to which appellant says he replied "Not as far as I am concerned it shouldn't." To Barry's insistence that an "account" name be on the check, appellant, in part, admittedly answered "Well, that is up to you." [R. 341.]

Similarly, appellant admits that Williams telephoned to him respecting the omission of the words "West Coast Supply Co." from the 30,000 lb. check which he had sent the Spreckels Sugar Company [R. 341-342] and appellant admits that he replied "Well, what about it?" when this omission was brought to his attention and asserted that he rejected the demand that an "account name" appear on the check [R. 342-343].

Then, as to the 600,000 lb. check [R. 298], appellant claimed on the stand that in reply to Leland's telephone complaint that the check bore no account name, he, appellant, replied that he was aware of that fact, asked, "What of it?", rejected Leland's representations that the account name should appear on the check, and said also, in part, to Leland that he could put the account name on the check, that "I can't prevent you from putting it on there, but I don't think it's necessary. *You asked for a check. You got what you consider a check. What more do you want?*" [R. 342-343; italics ours].

The sugar brokers were "sufficiently well acquainted with me (appellant) to know from my voice who was talking" [R. 388]; in fact appellant was an old customer [R. 388-390].

On July 25 or 26, 1948, a Saturday, the bank official in charge of sugar ration accounts [R. 60-61] spoke to appellant advising him that the 600,000 lb. check had come in and that there were not enough pounds to the credit of the account to cover it. Appellant promised to contact the bank on Monday; he never made any deposits to cover the check [R. 75-77]. When the 660,000 lb. check came through to the bank, appellant told the bank official "Well, your instructions are to post it and show it as an overdraft and report it to the Office of Price Administration" [R. 77-78]. The final "overdraft" was of 1,351,804 lbs. [R. 120].

When a bank statement was later sent to the West Coast Supply Company showing these checks as charged against its account, it at no time objected [R. 100-101, 119].

QUESTIONS PRESENTED.

Appellant has placed before this Court in his brief (A. B. 7-8), thirteen "Specifications of Error" which he uses as points on appeal, and as questions presented for determination by this Court.

To save the time of this Court, we shall discuss each of these thirteen points *seriatim*.

I.

Appellant complains (A. B. 9-16) that the District Court committed reversible error by admitting in evidence the four ration checks which appellant issued in order to obtain the sugar, which was subsequently sent to him, each of which ration checks constitutes the basis for one of the odd numbered counts of the Information.

A reading of the so-called "Specification of Error I," which appellant uses as his argument, makes apparent that appellant seeks to transplant law relating to negotiable instruments into rules of evidence relating to criminal proceedings in the Federal District Courts by contending that a so-called "alteration" or "suspicion of alteration" (A. B. 10) of these checks precludes their admission in evidence as against appellant or his co-defendant. Plainly appellant's contention is without merit.

The ration checks were issued by appellant with the intent that they be accepted as valid ration currency by the sugar brokers from whom he ordered the sugar. Appellant's deliberate omission of the name of the West Coast Supply Company, even if his testimony to that effect were to be accepted at face value, in itself has prohibitive force with reference to the element of wilfulness. Manifestly the *modus operandi* of the appellant in his efforts to ob-

tain a rationed commodity to which he was not entitled, by utilization of the scheme which he concocted, constitutes evidence having prohibitive force as to the issues in this case.

For appellant to argue that his attempts to mislead the innocent vendors of the sugar should now constitute the cloak protecting him from prosecution indicates, we submit, that even after conviction appellant is still attempting to out-smart the Congress and the courts. That this Court obviously will not tolerate.

Even if the words "West Coast Supply Company" were not present upon the ration checks, it is clear from the entire record that appellant, being an authorized signatory for that company upon that ration account, and having no ration account in his own name, was deliberately misleading the brokers, with whom he had dealt on many occasions before on behalf of the West Coast Supply Company, into thinking that he was still functioning in that capacity. In fact, appellant was so functioning, and desired the brokers to so regard him, and deliberately intended that they should transfer to him the 1,300,000 pounds of sugar to which he knew he was not entitled.

Whether the actions of appellant with reference to these checks were in violation of the law, was a matter of proof for the Government. Such proof consisted of all the testimony and exhibits in the record. The alleged absence of certain words from the checks when they were issued was an issue of fact for the jury; it could hardly resolve that issue without seeing the checks. And it obviously could not see them until they were admitted in evidence.

In fact, upon appellant's own theory of the case, the checks were not only admissible in evidence but were indispensable to him. And the testimony as to the circumstances under which the name "West Coast Supply Co." appeared on these checks all went to the basic theories of both the appellant's and the Government's cases.

Plainly, appellant, an attorney, a former O. P. A. ration board member, concocted a scheme to evade the sugar rationing regulations and to obtain an unusually large amount of sugar without right to do so; his scheme backfired and he is now seeking to extricate himself by means of technical and specious arguments and contentions. This Court should not permit him that avenue of escape.

II.

Appellant in effect asserts (A. B. 17-27) that a certain conversation between appellant and Government investigator Loud should not have been admitted in evidence.

The testimony of that witness relating to a conversation was offered upon the element of wilfulness and disclosed that prior to July 1, 1946, appellant said that "he was going to get sugar one way or another"; that he was short of sugar; that "inasmuch as meat rationing and gasoline and processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory," that appellant felt the same thing would happen with reference to sugar, and he was going to get it one way or another.

Investigator Loud informed appellant during the conversation, which took place in February, 1946, that sugar rationing was not off, and that anything appellant did

contrary to the regulations would be illegal. Thereupon appellant replied that he was not going to be caught short, that he was going to build up his inventory in case sugar rationing went off, and he was going to be supplied with as much sugar as he could possibly get [R. 293].

As appellant, in part, correctly appraises this conversation, it "expressed a design or plan to obtain sugar" on the part of appellant (A. B. 21). It further constituted evidence material to the issue of wilfulness, we submit, and was properly admitted into the case by the trial court.

The state of mind of the appellant was in part revealed by this conversation and, considered in the light of subsequent events in which appellant participated, this conversation furnished proof which the jury could accept as indicating that prior to July 1, 1946, appellant had a preconceived method for obtaining sugar regardless of rationing restrictions and that he later did so despite the fact that he knew his acts were in violation of the law. And, as the District Court pointed out upon the argument in this connection, "any knowledge brought to the defendant with reference to the regulations, or anything that he said with reference to his attitude towards those regulations, is admissible" [R. 288-289].

Appellant's subsequent denial on the witness stand that such a conversation had taken place with Loud, presented an issue of credibility for the jury, resolution of which could properly affect not only the jury's beliefs and disbeliefs as to the occurrence of this particular incident, but could also form a basis for the jury's final conclusion as to the appellant's true purposes, motives and activities in this case, both as established by this resolution and inferrible from all of the evidence in the case. What the appellant is complaining of in this instance is actually, we submit,

not so much the propriety of the trial court's ruling in admitting this evidence, since the trial court had almost unlimited discretion on ruling on the admissibility of evidence, but merely the fact that appellant, having finally found that he out-smarted himself in all his activities and dealings, was not successful in causing the jury to believe his protestations of innocence. This court plainly should now offer no aid to appellant in his efforts to extricate himself from the effects of his wilful, illegal acts.

III.

Appellant argues (A. B. 28) that his motion for judgment of acquittal should have been granted for the reasoning that the balance in the sugar ration account of the West Coast Supply Company was in excess of the total poundage in ration credits withdrawn by the checks which constitute the basis for half of the counts (A. B. 28-32).

This contention is wholly without merit. Appellant simultaneously issued checks for a total of more than 1,300,000 pounds of sugar upon an account having a balance of less than 40,000 pounds. The check for 600,000 pounds (G. E. 6) was the first which was charged against the rationing account, thereby immediately creating an overdraft.

Appellant had no ration account under his own name, and the West Coast Supply Company's account, on which he was an authorized drawer, not only did not have any such balance as that drawn against it, but it is clear that appellant was under no misconception as to these facts; he knew them, but was out to obtain sugar in any way he could. That he succeeded in doing so in gross violation of the law, is clear.

Appellant persistently repeats (A. B. 30 ff) his baseless contention to the effect that his alleged omission of the words "West Coast Supply Company" from the ration checks places his acts in obtaining the 1,370,000 pounds of sugar beyond the pale of the law. This argument is so preposterous as to fall of its own weight.

It is clear that appellant, who had been dealing with the sugar suppliers as the direct representative of the West Coast Supply Company, and who bought the 1,370,000 pounds of sugar on July 1, 1946, in its name and for delivery to it, clearly intended to, and did succeed in carrying out the transaction, at least ostensibly, on behalf of that concern. And in issuing the ration checks he did so also in that guise. When the sugar arrived, appellant, under another of his fictitious-name identities, which he appears to have used at random as best fitted his scheme of the moment, received the sugar and paid for it.

It is plainly immaterial what name appellant appended to the ration and money checks, or what name he bore in performing each act. In every instance it was appellant who conceived the idea, projected it into action, and reaped the benefits of his own machinations. His gyrations should not permit him to avoid the inescapable fact that he bought and accepted the delivery of sugar when he had no right to it under the rationing laws and regulations, and that he illegally issued ration currency for a total of 1,370,000 pounds of sugar when the only account to which he had access contained a balance of less than 40,000 pounds.

IV.

Appellant complains (A. B. 38 ff) that he was forced to produce his private papers. The complaint is baseless.

Appellant, an attorney, offered himself as a witness in his own defense. While testifying on direct examination, appellant testified as to his money payments for the 1,370,000 pounds of sugar [R. 354 ff]. He said the payments were made by the John H. Ziegler Company, by check [R. 354-355]. The Government's objection to testimony respecting the checks, on the ground that the payment check should be produced, was sustained after appellant had said that he made the payments [R. 354-355]. Appellant then offered to obtain the last check, because he could not answer his counsel's question as to its terms [R. 355], and offered it in evidence, and it was received [R. 355-356].

The identity of the purchaser of the sugar and of the person who accepted it was an issue in the case, as was the question of overdrawing upon the West Coast Supply Company's ration account.

On cross-examination appellant was questioned concerning the fact that the money check introduced by him in evidence showed on its face that it was in payment of a "West Coast Supply Co." transaction [R. 379]. He had testified that it was the John H. Ziegler Company which was manufacturing sugar products [R. 333, 335, 344].

Government counsel asked appellant [R. 381] whether the other three money checks used to pay for the sugar purchases were in the same form as that offered in evi-

dence by appellant. Appellant, an attorney, replied by stating that "the checks are here in court." [R. 381]. His attorney, however, then refused to produce the checks [R. 381-383]. Upon order of the Court, the checks were produced [R. 383].

The request for these checks in the light of all the facts in the case and appellant's testimony, was clearly proper, as was the court's ruling. Appellant had opened the entire subject by his defense theory and his testimony on his direct examination. Not only were the facts in issue as to which he had thus testified, but his overall credibility was subject to question.

Having offered himself as a witness, having first developed the subject of the cash payments for the sugar and the interrelation of the activities of the two companies, and having proffered the checks in the first instance, appellant should not now be heard to complain because the Court had the checks finally produced.

United States v. Hoyt, 53 F. (2d) 881;

Bioldeau v. United States, 14 F. (2d) 582, 273 U. S. 737;

Garcia v. State, 35 Ariz. 35, 274 Pac. 166.

V.

The so-called "expert" testimony of Schneider (A. B. 47 ff) had no place in the trial below. By offering this testimony, appellant was seeking to introduce matters foreign to the criminal prosecution, matters which could not possibly affect the outcome of the case since they were not relevant or material to the issues involved, as a reading of appellant's offer of proof in this respect will disclose [R. 409-411, 420-424]. The evidence was properly rejected by the trial court.

VI-XIII.

Eight specifications of error (A. B. 53-67) relate to some instructions given by the Court below, and others not given.

The law applicable to this case was fully and adequately stated by the trial court in its instructions to the jury [R. 617-639]. Those concerning which appellant complains as having been refused by the Court, were properly refused, and those given, were proper in every respect.

(1) Government's Instruction 8 (A. B. 53) correctly states the law. And appellant's objection to it on the ground that it "disregarded the major part of appellant's defense, namely, lack of intent," is baseless. Ignorance of the law is no excuse. And appellant was the expert on regulations pertaining to sugar at the concerns involved in this case; he was a former O. P. A. ration board officer, and is an attorney. Surely, at least in his latter capacity he must have known that ignorance of the law would not excuse him. Moreover, the record discloses a deliberate disregard of the law on his part, not ignorance of it. The instruction was proper.

(2) Defendant's Requested Instruction No. 16 (A. B. 54) constituted a further attempt by appellant to avoid the conviction by confusing the jury as to the true issues in the case. The requested instruction was unnecessary to a full statement of the applicable law on the evidence in the case. The effect of this instruction was to require the jury to bring in a verdict of not guilty.

(3) Defendant's Requested Instruction No. 22 (A. B. 56) does not correctly state the law. Sugar rationing was not continued by Executive Order 9745; it was always in effect under the Second War Powers Act which remained in existence at all times material in this case. The Executive Order merely continued the administrative functions of the O. P. A. in enforcing sugar rationing.

Moreover, publication of a law or regulation in the Federal Register creates notice by law, irrebuttable in that respect—and contrary to the terms of this proposed instruction.

Nor has this proposed instruction anything in it which might bear on the element of wilfulness. That was fully covered, moreover, by the court's instructions.

(4) Defendant's Requested Instructions Nos. 26, 35 and 36 [R. 60, 62, 63] do not correctly reflect the law. Their effect would have been to inject issues here not properly in the case, and to mislead the jury as to the requirements of the law.

(5) Defendant's Requested Instruction No. 37 (A. B. 64) confuses the issues, and the correct law in that respect was in fact given the jury by the trial court [R. 624].

(6) Defendant's Requested Instruction No. 39 (A. B. 67) was also properly rejected. This instruction is almost the same as Defendant's 22 (item 3 above), and it was improper for the same reasons.

Conclusion.

No reversible error was committed by the trial judge. Appellant had a full and fair trial. The verdict is fully supported by the evidence. The sentence was moderate and clearly justified. The judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

24-5-7
No. 11,555

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

CHARLES H. CARR,
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FILED

APR 16 1949

PAUL P. O'BRIEN,

CLERK

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No. 11,555
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the Appellant in the above entitled cause and presents his Petition for Rehearing of the above entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is at variance with the Transcript of Record and is contrary to law in the following particulars:

I.

The decision of this court, based upon the finding by this Court that there was substantial evidence that Appellant was a member of the partnership of West Coast Supply Company, is directly contrary to the record and is an invasion, by this Court, of the province and functions of the jury since the lower court had instructed the jury, as a matter of law, that the evidence adduced at the trial

was insufficient to prove Appellant was a partner of the West Coast Supply Company [R. 625].

A. The decision of this Court affirming the judgment of conviction on Counts 1, 3, 5 and 7 is erroneous because it is predicated upon the premise that Appellant was a depositor as defined by Third Revised Ration Order No. 3, Section 24.1(c)(9) since he was one of the partners of West Coast Supply Company in which name and on which account the ration checks were purportedly drawn, when the record shows that the lower court instructed the jury, as a matter of law, that there was insufficient evidence to prove that Appellant was a member of the partnership [R. 625]. If he was not a member of the partnership, it was not his account and he was not a depositor. Therefore, one of the elements of the offense was not proved under Counts 1, 3, 5 and 7.

B. The decision of this Court affirming the judgment of conviction on Counts 2, 4, 6 and 8 is erroneous because it is predicated upon the premise that Appellant was a partner of the West Coast Supply Company, and the receiving of the sugar by West Coast Supply Company was the receiving of a rationed commodity by Appellant since he was a member of said partnership, when the record shows that the lower court instructed the jury, as a matter of law, that there was insufficient evidence to prove that Appellant was a member of the partnership and that the jury must find that Appellant was not a partner of West Coast Supply Company [R. 625].

I.

The Decision of This Court, Based Upon the Finding by This Court That There Was Substantial Evidence That Appellant Was a Member of the Partnership of West Coast Supply Company, Is Directly Contrary to the Record and Is an Invasion, by This Court, of the Province and Functions of the Jury Since the Lower Court Had Instructed the Jury, as a Matter of Law, That the Evidence Adduced at the Trial Was Insufficient to Prove Appellant Was a Partner of the West Coast Supply Company [R. 625].

- A. The Decision of This Court Affirming the Judgment of Conviction on Counts 1, 3, 5 and 7 Is Erroneous Because It Is Predicated Upon the Premise That Appellant Was a Depositor as Defined by Third Revised Ration Order No. 3, Section 24.1(c) (9) Since He Was One of the Partners of West Coast Supply Company in Which Name and on Which Account the Ration Checks Were Purportedly Drawn, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Appellant Was a Member of the Partnership [R. 625]. If He Was Not a Member of the Partnership, It Was Not His Account and He Was Not a Depositor. Therefore, One of the Elements of the Offense Was Not Proved Under Counts 1, 3, 5 and 7.

This Court found that there was substantial evidence that Appellant was a member of the partnership of West Coast Supply Company despite the fact that the lower court withdrew and excluded from the jury the issue of whether or not Appellant was a member of the partner-

ship, West Coast Supply Company. In that connection, the lower court instructed the jury as follows:

“You are instructed that the evidence adduced at the trial was insufficient to prove the defendant, Paul J. Ziegler, was at any of the times mentioned in any or all counts of the information a partner of the West Coast Supply Company. *You will accordingly find, therefore, that Paul J. Ziegler was not at any of the times mentioned in the information a partner of the said West Coast Supply Company.*” [R. 625.] (Emphasis supplied.)

As noted by this Court in its opinion on page 7, Appellant's contention on appeal was that he did not have “an ‘account,’ as defined in subparagraph (1) of paragraph (c) of §24.1 of Third Revised Ration Order No. 3, and hence was not a ‘depositor,’ as defined in subparagraph (9) of paragraph (c), and that therefore the ration checks drawn by him were not ‘checks,’ as defined in subparagraph (5) of paragraph (c).” This Court decided that Appellant was a partner; that because he was one of the partners of the West Coast Supply Company, the accounts of that Company were his accounts, and he was, therefore, a depositor as defined in subparagraph (9), and the checks drawn by him were checks as defined in subparagraph (5). In order to arrive at this conclusion, this Court necessarily had to find that Appellant was a partner of the West Coast Supply Company. Otherwise it is obvious that the Court would have had to conclude that Appellant did not have a ration account within the meaning of the provisions of Third Revised Ration Order No. 3 heretofore mentioned.

One of the grounds of the Motion for Judgment of Acquittal [R. 311-15] and which was renewed at the conclusion of the case [R. 443-451] was that the evidence

was insufficient to prove that Appellant was a depositor or had an account within the meaning of Third Revised Ration Order No. 3, and that, therefore, the purported checks were not checks within the meaning of such Ration Order. Consequently, there was a failure of proof as to Counts 1, 3, 5 and 7.

Counts 1, 3, 5 and 7 charged an offense under Section 15.7 (d) of Third Revised Ration Order No. 3 which provides:

“OVERDRAFTS PROHIBITED. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Under the foregoing section, in order to be an overdraft the check would have to be issued on the account of the depositor. Otherwise no offense would be stated under this section. Subparagraph (5) of paragraph (c) of Section 24.1 of the above mentioned Ration Order provides:

“ ‘Check’ means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account * * * ”

and subparagraph (9) provides:

“ ‘Depositor’ means a person who has a ration bank account. * * * ”

In reviewing the ruling of the lower court on the Motion for Judgment of Acquittal, this Court concluded there was substantial evidence that Appellant was, in fact, a mem-

ber of the partnership, West Coast Supply Company, in which name the ration account was carried. This Court stated on page 4 of the opinion:

“At all pertinent times, *appellant* and his father (John H. Ziegler) and brothers (Allen S. Ziegler and Raymond M. Ziegler) were partners doing business in Los Angeles, California, under the name West Coast Supply Company.” (Op. p. 4.) (Emphasis supplied.)

And again:

“These contentions are based on the false assumption that West Coast Supply Company and appellant were distinct entities. As indicated above, the evidence showed that West Coast Supply Company was a partnership the members of which were appellant and his father and brothers.¹²” (Op. p. 7.)

Also this Court, on page 7 of its opinion, in footnote 12, stated:

“Although he denied it, there was substantial evidence that appellant was, in fact, a member of the partnership.”

Apparently this Court was in accord with the contention that one of the elements of proof necessary to sustain a conviction on Counts 1, 3, 5 and 7 was that Appellant must have had an “account” as defined in subparagraph (1) of paragraph (c) of Section 24.1 of the Ration Order, was a “depositor” as defined in subparagraph (9) of paragraph (c) thereof, and also that the checks drawn by Appellant were checks as defined in subparagraph (5) of paragraph (c) thereof. Unless the checks were issued on an account of Appellant, they could not be an overdraft.

This Court apparently weighed the evidence on the record and determined that it was sufficient to prove that Appellant was a partner of the West Coast Supply Company, and it thus arrived at the conclusion that the partnership ration bank accounts were accounts of the partnership members. In so doing, this Court completely disregarded the fact that the jury had not passed on the issue of whether Appellant was a partner since the lower court had withdrawn it from the jury. When the lower court instructed the jury, as a matter of law, that the evidence on this particular issue was insufficient and that the jury must find that Appellant was not a partner of the West Coast Supply Company, that issue was withdrawn entirely from the jury's consideration. If this Court concluded that the evidence that Appellant was a partner was sufficient to go to the jury, then there was only one alternative and that was for the Court to reverse the case and send it back for a new trial thereby permitting a jury to pass upon the factual issue as to whether or not Appellant was a member of the partnership. By doing otherwise, this Court invaded the province of the jury and endeavored to determine a question of fact which could be determined in a jury trial only by a jury.

On appeal from a denial of a motion to acquit for lack of evidence as to any material issue, the appellate court may review questions of law only and not questions of fact. As was pointed out by the Supreme Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 254, 84 L. Ed. 1129, 1184:

“His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised,

which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict.”

And, as was said in *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 88, 87 L. Ed. 626, 633:

“But it is also familiar appellate procedure that where the correctness of the lower court’s decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.”

See, also:

Troxell v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434, 444, 57 L. Ed. 586, 591;

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720, 724.

An appeal from a denial of a motion to acquit permits the appellate court to consider whether there was evidence to sustain the verdict and not pass upon the weight of the evidence or to make findings of fact. If there is any issue of fact, it must be determined by the jury, and no issue of fact can be revised by this Court.

Hedderly v. U. S., (9 Cir.) 193 Fed. 561, 571;

O’Leary v. U. S., (9 Cir.) 160 F. 2d 333, 336;

24 C. J. S., p. 670, Sec. 1832; and

24 C. J. S., p. 785, Sec. 1880.

Whether there is a legal sufficiency of evidence in support of a material issue of the case which will warrant its submission to the jury is a question of law for the Court.

See:

Marande v. Texas & Pacific Railway Co., 184 U. S. 173, 46 L. Ed. 487, 494;

State v. Karas, 43 Utah 506, 136 Pac. 788;

Gray v. State, (7 Okl. Cr. 102) 122 Pac. 265;

State v. Flory, 203 Iowa 918, 210 N. W. 961;

State v. Rheams, 58 Minn. 478, 24 N. W. 302;

23 C. J. S., p. 651, Sec. 1139.

The instruction to the jury by the lower court that they must find Appellant was not a partner of West Coast Supply Company was binding upon the jury and it was their duty to follow such instruction. The instructions are the law of the case and bind the jury even though they may be erroneous.

Pelz v. U. S. (2 Cir.), 54 F. 2d 1001;

53 *Am. Jur.* p. 620, Sections 844 and 845.

Furthermore, the reviewing court should presume that the jury followed and applied the charge or instructions given it by the trial court in reaching its verdict.

Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740;

Clark v. McClurg, 215 Cal. 279, 284, 9 P. 2d 505;

Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873;

3 *Am. Jur.* p. 513, Sec. 951.

It was Appellant's contention at the trial that the evidence was wholly insufficient to show that he was a partner of the West Coast Supply Company, and the District Court agreed with that view, instructing the jury that they were to find that Appellant was not a partner [R. 625]. Irrespective of whether the view taken by the District Court was correct or not, the instruction given by that Court did take away from the jury the opportunity to pass upon that issue so that, when the case came before this Court on appeal, there was no evidence to support the verdict of the jury on the question of whether or not appellant was a member of the partnership if such were required. Under these circumstances, this Court may not conclude guilt from the record, for to do so would be to invade the province of the jury and usurp its functions.

The sole question for determination on this appeal was whether or not there was sufficient evidence to support the verdict of the jury. It is submitted that there was not, for the reason that there was no evidence before the jury to show that Appellant was a partner of the West Coast Supply Company. The withdrawal of that issue from the jury, whether correct or incorrect, cannot be remedied by this Court except by a return of the case for a retrial and resubmission of the issue in question to a jury. An analogous situation was decided by this Court in *Shaw v. U. S.* (9 Cir.), 131 F. 2d 476. As was pointed out by the Supreme Court in *Bollenbach v. U. S.*, 326 U. S. 607, 614, 90 L. Ed. 350, 355:

"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, *but*

whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.” (Emphasis supplied.)

And again the Supreme Court reiterated in *Bihn v. U. S.*, 328 U. S. 633, 638, 90 L. Ed. 1484, 1488:

“Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach v. United States*, 326 U. S. 607, *ante*, 350, 66 S. Ct. 402.”

B. The Decision of This Court Affirming the Judgment of Conviction on Counts 2, 4, 6 and 8 Is Erroneous Because It Is Predicated Upon the Premise That Appellant Was a Partner of the West Coast Supply Company, and the Receiving of the Sugar by West Coast Supply Company Was the Receiving of a Rationed Commodity by Appellant Since He Was a Member of Said Partnership, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Appellant Was a Member of the Partnership and That the Jury Must Find That Appellant Was Not a Partner of West Coast Supply Company [R. 625].

It appears that this Court affirmed the judgments of conviction on Counts 2, 4, 6 and 8 upon the theory that Appellant received the rationed commodity, to-wit: sugar, as charged in the Information, since he was a partner of the West Coast Supply Company and the evidence showed that the sugar was actually received by that Company. It is true that the record does conclusively show that the

sugar was shipped to and received by the West Coast Supply Company. However, there was no evidence before the jury that Appellant was one of the partners of the West Coast Supply Company.

The District Court specifically directed the jury by an instruction to find that Appellant was not a partner of the West Coast Supply Company [R. 625]. Therefore, the basic support of this Court's decision was wholly lacking, namely, that Appellant was a partner and, that because he was a partner of the West Coast Supply Company, the receipt by that Company was "receipt" by him as charged in Counts 2, 4, 6 and 8 of the Information. What has been heretofore said respecting this Court's power to decide questions of fact which were not submitted to the jury applies with like force and effect here.

One of the grounds of the motion for judgment of acquittal as to Counts 2, 4, 6 and 8 [R. 311-16] and which was renewed at the conclusion of the case [R. 443-51] was that:

"Respecting Ziegler, (Appellant) as to Counts Two, Four, Six and Eight, there is not one scintilla of evidence, your Honor, that Paul Ziegler ever received one pound of sugar. So I submit those counts I have just enumerated, the receiving counts, a motion as to them properly lies as to Paul Ziegler." [R. 316.]

There can be no question that the evidence contained in the record on this appeal shows that the sugar was received by the West Coast Supply Company. The Govern-

ment introduced in evidence Exhibits 12 through 21, both inclusive, to establish that the sugar was actually delivered to the West Coast Supply Company. Exhibit 12 consisted of invoices to the West Coast Supply Company for sugar [R. 134]. Exhibit 13 consisted of freight bills showing the transfer of sugar to the West Coast Supply Company [R. 135]. Exhibit 14 consisted of delivery receipts showing delivery of sugar to the same Company [R. 135]. Exhibit 15 consisted of four documents showing shipment and delivery of sugar to West Coast Supply Company [R. 159]. Exhibits 16 through 20, both inclusive, were original and photostatic copies of documents showing the transfer of sugar to the West Coast Supply Company [R. 161]. The witness, Robert A. Russell, called by the Government, testified that he was employed by the West Coast Supply Company. He identified his signature on the above mentioned Exhibits [R. 257 *et seq.*]. All Exhibits introduced by the Government relating to delivery of the sugar show delivery to West Coast Supply Company.

The situation respecting Counts 2, 4, 6 and 8 is identical with that of Counts 1, 3, 5 and 7. Without proof that Appellant was one of the partners of the West Coast Supply Company, there is no proof to support the verdict of the jury that he received the sugar as charged in Counts 2, 4, 6 and 8 of the Information. The propositions of law and the authorities heretofore cited in connection with the argument relative to Counts 1, 3, 5 and 7 are equally applicable here.

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the Appellant in this case, and that Appellant is justly entitled to a reconsideration and to a rehearing in order that he may fully and completely present the errors complained of, and that upon further consideration this Court may set aside the conviction of Appellant on each and every count.

Respectfully submitted,

CHARLES H. CARR,
Attorney for Appellant.

Certificate of Counsel.

I, counsel for the above named appellant, do hereby certify that the foregoing Petition for Rehearing of this cause, in my opinion, is well founded, fully justified and that it is not interposed for delay.

CHARLES H. CARR,
Attorney for Appellant.

No. 11556

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGNESIUM PRODUCTS, INC., a corporation,

Appellant,

vs.

**NORTH AMERICAN AVIATION, INC., a corpora-
tion, and UNITED STATES OF AMERICA,**

Appellees.

TRANSCRIPT OF RECORD

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

FILED

MAY 22 1947

**PAUL P. O'BRIEN,
CLERK**

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United States Circuit Court of Appeals

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

BAILEY & POE

639 South Spring Street

Los Angeles 14, Calif.

For Appellee North American Aviation, Inc.:

FLINT & MACKAY

Twelfth Floor, Rowan Building

458 South Spring Street

Los Angeles 14, Calif.

For Appellee United States of America:

JOHN F. SONNETT

Assistant Attorney General

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ROBERT E. WRIGHT

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

District Court of the United States for the
Southern District of California
Central Division

Civil Action No. 4390-O'C

MAGNESIUM PRODUCTS, INC., a corporation, 1119
Santa Fe Avenue, Los Angeles 21, California,
Plaintiff,

vs.

NORTH AMERICAN AVIATION, INC., a corpora-
tion, Inglewood, California,
Defendant.

COMPLAINT FOR MONEY

Plaintiff complains and alleges:

I.

That at all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business located at 1119 Santa Fe Avenue, Los Angeles, California.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was and now is doing business within the State of California, to-wit, Inglewood, Los Angeles County, California. [2]

II.

That the matter in controversy and the value of the property and property rights involved herein exceeds, ex-

clusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00), to-wit, the sum of Twenty Thousand Two Hundred Four and 03/100 Dollars (\$20,204.03).

III.

That on or about the 31st day of March, 1945, at the City of Los Angeles, County of Los Angeles, State of California, and within the jurisdiction of the above entitled court, defendant became indebted to plaintiff in the sum of Twenty Thousand Two Hundred Four and 03/100 Dollars (\$20,204.03) for goods, wares and merchandise sold and delivered to defendant at its special instance and request; that the agreed price for said goods, wares and merchandise was and is the sum of Twenty Thousand Two Hundred Four and 03/100 Dollars (\$20,204.03); that no part of said sum has been paid to plaintiff although demand has been made therefor but to the contrary defendant refuses to pay said sum or any part thereof to plaintiff.

For a Second and Separate Cause of Action Plaintiff Complains and Alleges:

I.

Plaintiff reiterates and repleads all of the allegations contained in paragraphs I and II of its first cause of action as though the same were set forth in full at this portion of its complaint.

II.

Defendant owes plaintiff the sum of Twenty Thousand Two Hundred Four and 03/100 Dollars (\$20,204.03) according to the account hereto annexed as Exhibit A together with interest thereon as follows: interest at 7%

per annum on the sum of Sixteen Thousand Eight Hundred Sixty-six and $43/100$ Dollars (\$16,866.43) from the [3] 6th day of September, 1944; interest at 7% per annum on the sum of One Thousand Three Hundred Ninety-three and $05/100$ Dollars (\$1,393.05) from the 27th day of February, 1945; and interest at 7% per annum on the sum of One Thousand Nine Hundred Forty-four and $55/100$ Dollars (\$1,944.55) from the 31st day of March, 1945.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty Thousand Two Hundred Four and $03/100$ Dollars (\$20,204.03) together with interest thereon as follows: interest at 7% per annum on the sum of Sixteen Thousand Eight Hundred Sixty-six and $43/100$ Dollars (\$16,866.43) from the 6th day of September, 1944; interest at 7% per annum on the sum of One Thousand Three Hundred Ninety-three and $05/100$ Dollars (\$1,393.05) from the 27th day of February, 1945; and interest at 7% per annum on the sum of One Thousand Nine Hundred Forty-four and $55/100$ Dollars (\$1,944.55) from the 31st day of March, 1945; for costs of suit herein incurred and for such other and further relief as may be just and equitable.

BAILEY & POE
RUFUS BAILEY
ARLO D. POE

639 South Spring Street
Los Angeles 14, California
Telephone—TRinity 8325 [4]

[EXHIBIT A]

Old Balance	Date	Inv. No.	Charges	Credits	Balance
16,866.43	9-1-44				16,866.43
	1-12-45	72888	5.00		
	1-25-45	73042	45.20		
	1-29-45	73072	117.52		17,034.15
17,034.15	1-30-CM	4032		24.46	17,009.69
17,009.69	2-1-45	73157	73.45		
	2-8-45	73261	197.75		
	2-9-45	73272	1.14		
	2-12-45	73274	50.85		
	2-13-45	73277	85.88		
	2-13-45	73278	56.50		
	2-16-45	73351	291.54		
	2-22-45	73433	148.03		
	2-26-45	73489	196.62		
	2-27-45	73496	148.03		18,259.48
18,259.48	3-6-45	73562	33.90		
	3-17-45	73694	529.97		
	3-22-45	73729	697.21		
	3-31-45	73824	233.91		
	3-31-45	73825	449.56		20,204.03

[Endosed]: Filed Apr. 19, 1945. [5]

[Title of District Court and Cause]

ANSWER

Comes now the defendant, North American Aviation, Inc., a corporation, and for answer to the complaint filed herein, admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of said complaint.

II.

Admits the allegations of paragraph II of said complaint.

III.

For answer to paragraph III of said complaint, defendant admits that at the City of Los Angeles, County of Los Angeles, State of California, and within the jurisdiction of the above entitled Court, defendant became indebted to plaintiff in the sum of [6] \$20,204.03; admits that no part of said sum has been paid to plaintiff, admits that demand has been made therefor; admits that defendant refuses to pay said sum or any part thereof to plaintiff, and in this connection this defendant affirmatively alleges as follows:

(1) That at all times in the complaint herein mentioned there was in force and effect Section 403, incorporated in the Sixth National Defense Appropriation Act, 1942, (Act—April 28, 1942, C. 247—Title IV, Sec. 403,—56 Stat. 245,—50 U. S. C. A., Sec. 1191, as amended) as approved April 28, 1942, as amended by Sec. 801, Title VIII of the Revenue Act of 1942—Laws

of the 77th Congress—2nd Session—Chap. 619—Public Law 753, approved Oct. 21, 1942, and effective as of April 28, 1942, and as further amended by Laws of the 78th Congress—First Session—Chap. 239—Public Law 149, approved July 14, 1943, and effective as of April 28, 1942, which Section 403, as amended, is known as “The Renegotiation Act”; that said Act, as amended as aforesaid, after defining in Subsections (a) (1), (2), (3) and (4), the terms “Department”, “Secretary”, “renegotiate”, “renegotiation” and “excessive profits”, provides in Sections (c) (1) and (2) thereof as follows:

“(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract [7] price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such exces-

sive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

(2) That this defendant, North American Aviation, Inc., is and was at all of the times in said complaint mentioned a "contractor" within the meaning of that term as used in Sections (c) [8] (1) and (2) above quoted, and is and was at all times in the complaint herein mentioned, engaged in the manufacture and production of airplanes, parts and supplies, under written contracts with the Government of the United States and its "Departments", as that term is defined in said "Renegotiation Act".

(3) That the plaintiff herein, Magnesium Products, Inc., is, and at all of the times in said complaint men-

tioned was, a "subcontractor" within the meaning of that term as used in Sections (c) (1) and (2) above quoted, and was engaged, among other activities, in manufacturing and furnishing to defendant certain magnesium castings and other supplies, used by the defendant in the manufacture and production of airplanes, parts and supplies, under written contracts with the Government of the United States and its Departments, as hereinabove set forth; that the goods, wares and merchandise described in paragraph III of the complaint herein, and all of them, were furnished by plaintiff to defendant for, and were used by defendant in the manufacture and production of airplanes, parts and supplies for the Government of the United States of America, and its "Departments", as aforesaid, and such uses and purposes were at all times known to plaintiff.

(4) Defendant is informed and believes, and upon such information and belief alleges that prior to August 31, 1944, the plaintiff held contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended; that prior to said date renegotiation had taken place between the Under Secretary of War and the said plaintiff, pursuant to the provisions of said Act, for the purpose of eliminating excess profits realized by the plaintiff during its fiscal year ended November 30, 1942, under said contracts and subcontracts; that pursuant thereto and pursuant to the authority and discretion vested in the Secretary of War and others by said Act, duly delegated to the Under Secre- [9] tary of War under Subdivision (f) of said Act, the said Under Secretary of War, on or about June 6, 1944, found and

determined that \$250,000.00 of the profits realized by the plaintiff during its fiscal year ended November 30, 1942, under its contracts and subcontracts subject to renegotiation, pursuant to the provisions of said Act, were excessive; that attached hereto, marked Exhibit "A" and by reference in corporated herein and made a part hereof is a true, correct and complete copy of "Determination of Excessive Profits" found and determined by Robert P. Patterson, Under Secretary of War under date of June 6, 1944.

(5) That on or about September 12, 1944, there was served upon this defendant a "Direction to Withhold From Magnesium Products, Inc., of Los Angeles, California, Pursuant to the Renegotiation Act", dated September 6, 1944, signed by Robert P. Patterson, Under Secretary of War, a true, correct and complete copy of which is attached hereto, marked Exhibit "B" and by reference incorporated herein and made a part hereof, which said Direction, issued pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and particularly Subdivision (c) (2) (iii) thereof, directed this defendant to withhold for the account of the United States any and all amounts (not in excess of \$40,000.00 in the aggregate) otherwise due or which thereafter should become due from this defendant to said Magnesium Products, Inc., the plaintiff herein.

(6) That thereafter, and on or about September 14, 1944, this defendant advised the said Under Secretary of War, Robert P. Patterson, that it was, pursuant to the direction from the Under Secretary of War, dated September 6, 1944, withholding from monies otherwise due

Magnesium Products, Inc., the plaintiff herein, the sum of \$7,820.37.

(7) That thereafter, and on or about October 14, 1944, this defendant received from Robert P. Patterson, Under Secretary [10] of War, a certain telegram amending said letter directive of September 6, 1944, (Exhibit "B" hereto) wherein and whereby this defendant was directed to continue to withhold such amounts as were otherwise due from this defendant to Magnesium Products, Inc., the plaintiff herein, at the close of business on October 14, 1944, and also further directed to withhold no additional amounts until October 30, 1944, on which date this defendant was further directed to resume withholding in accordance with the said letter of September 6, 1944 (Exhibit "B" hereto) until the total of amounts withheld through October 14, 1944 and after October 30, 1944, equalled \$33,500.00; that a true, correct and complete copy of said telegram of October 14, 1944, is attached hereto, marked Exhibit "C" and by reference incorporated herein and made a part hereof; that thereafter, and on or about October 17, 1944, this defendant directed a telegram to Robert P. Patterson, Under Secretary of War, in response to said telegram of October 14, 1944 (Exhibit "C" hereto), advising the said Under Secretary of war that the amount withheld from Magnesium Products, Inc., the plaintiff herein, by this defendant was, as of October 10, 1944, \$16,866.43; that a true, correct and complete copy of said telegram of October 17, 1944, is attached hereto, marked Exhibit "D", and by reference incorporated herein and made a part hereof; that thereafter, and on or about October 19, 1944, the said Robert P. Patterson, Under Secretary of War, directed a tele-

gram to this defendant, wherein and whereby said telegram of October 14, 1944 (Exhibit "C" hereto) was amended to refer to a total of not less than \$16,866.43; that a true, correct and complete copy of said telegram of October 19, 1944, is attached hereto, marked Exhibit "E", and by reference incorporated herein and made a part hereof.

(8) That pursuant to said direction of September 6, 1944, (Exhibit "B" hereto) as amended by said telegram of October 14, 1944, (Exhibit "C" hereto) and said telegram of October 19, 1944, [11] (Exhibit "E" hereto), this defendant has withheld for the account of the United States, from monies otherwise due or which thereafter became due from this defendant to Magnesium Products, Inc., the plaintiff herein, the sum of \$20,204.03; that said sum is the aggregate of withholdings made from time to time from August 31, 1944, to and including March 31, 1945, at the times and in the amounts set forth in that certain Statement of Account attached hereto, marked Exhibit "F", and by reference incorporated herein and made a part hereof; that all of said monies, and the total thereof, was withheld solely by reason of said Directive of September 6, 1944 (Exhibit "B" hereto), as amended, and for no other purpose or reason whatsoever, and that but for said Directive said sums and amounts would have been paid by defendant to plaintiff when the same became due respectively; that said Directive of September 6, 1944 (Exhibit "B" hereto), as amended, was, according to its terms, effective immediately, from September 16, 1944, and thereafter until

further notice from said Robert P. Patterson, Under Secretary of War; that no notice revoking, cancelling or terminating said Directive of September 6, 1944, or otherwise modifying this defendant's duty and obligation to withhold, as therein directed, has been received by this defendant from said Robert P. Patterson, Under Secretary of War, or any one else, and the said Directive of September 6, 1944 (as amended) has been at all times, since September 6, 1944, and now is in full force and effect; that by virtue thereof and of said Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, this defendant is required to impound and hold said sum of \$20,204.03, and the whole thereof, until such time as this defendant receives further notice from the said Robert P. Patterson, Under Secretary of War; that said sum of \$20,204.03 is the amount claimed by said Magnesium Products, Inc., the plaintiff herein, and upon which the [12] complaint in this action is based.

For Answer to the Second and Separate Cause of Action in the Complaint Herein, This Answering Defendant Admits, Denies and Alleges as Follows:

I.

This defendant reiterates and re-pleads all of the allegations contained in paragraphs I and II of its Answer to the first cause of action herein as though the same were set forth in full in this paragraph I of its Answer to plaintiff's second and separate cause of action.

II.

For answer to paragraph II of the second and separate cause of action of said complaint, this defendant admits that it owes plaintiff the sum of \$20,204.03; denies that said sum is owed in accordance with the account annexed as Exhibit A to said complaint, but on the contrary alleges that said sum of \$20,204.03 is owed from this defendant to plaintiff in accordance with that certain account attached hereto, marked Exhibit "F" and by reference incorporated herein and made a part hereof; denies each and all of the allegations of said paragraph II of the second and separate cause of action of said complaint not herein specifically admitted. For a further, separate and affirmative answer and defense to said second cause of action, this defendant reiterates and re-pleads each and all of the allegations contained in subparagraphs (1), (2), (3), (4), (5), (6), (7) and (8) of paragraph III of its answer to plaintiff's first cause of action as though the same were set forth in full in this paragraph II of defendant's answer to plaintiff's second and separate cause of action.

Wherefore, the defendant prays judgment that the complaint [13] of the plaintiff be dismissed with costs to the defendant.

FLINT & MACKAY

By Edward L. Compton

Attorneys for Defendant North American
Aviation, Inc. [14]

[EXHIBIT "A"]

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY

Washington

DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

Whereas, Magnesium Products, Inc. (hereinafter referred to as the Contractor), holds contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

Whereas, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its final year ended 30 November 1942, under said contracts and subcontracts; and

Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, Therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

That \$250,000 of the profits realized by the Contractor during its fiscal year ended 30 November 1942, under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

6 June 1944.

/s/ Robert P. Patterson
ROBERT P. PATTERSON
Under Secretary of War

A True Copy:

FRANK FOX

Captain, Ordinance Department

War Department Price Adjustment Board

SPRAR-8

5-17-44 [15]

[EXHIBIT "B"]

WAR DEPARTMENT

OFFICE OF THE UNDER SECRETARY

Washington 25, D. C.

6 September 1944.

North American Aviation, Inc.,

Inglewood, California.

Subject: Direction to Withhold from Magnesium Products, Inc., of Los Angeles, California, pursuant to the Renegotiation Act.

Gentlemen:

Pursuant to the authority vested in the Secretary of War under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and duly delegated to me, I found and determined on 6 June 1944 that certain of the prices and profits realized by Magnesium Products, Inc., during its fiscal year ended 30 November 1942 under contracts and subcontracts subject to renegotiation were excessive.

In accordance with the authority and duty to eliminate said excessive profits (after allowing to said Magnesium Products, Inc. credit for Federal taxes as provided in Section 3806 of the Internal Revenue Code) I hereby direct you to withhold for the account of the United States any and all amounts (not in excess of \$40,000 in the aggregate) otherwise due or which shall become due from you to said Magnesium Products, Inc.

This direction shall be effective immediately and shall continue in effect until further notice from me.

You are also directed to report in writing to the Chairman of the War Department Price Adjustment Board, Room 3D 573, The Pentagon, any amounts which you may from time to time withhold for the account of the United States pursuant hereto.

Very truly yours,

Robert P. Patterson

ROBERT P. PATTERSON

Under Secretary of War

[Stamped]: Received Sep. 12, 1944. Accounting. [16]

[EXHIBIT "C"]

LNA V LA 6

LA 218 V LA 388 NR 1

M

LA22

DA48

FB 18

WA38

LA V WARG NR 166 UD

FROM ROBERT P PATERSON UNDER SECRE-
TARY OF WAR WASHINGTON DC 142209Z

TO NORTH AMERICAN AVIATION INC INGLE-
WOOD CALIF

GRNC

MY LETTER 6 SEPTEMBER 1944 DIRECTING
YOU TO WITHHOLD 40000 FROM MAGNESIUM
PRODUCTS INC FOR ACCOUNT THE UNITED
STATES IS HEREBY AMENDED AS FOLLOWS
YOU ARE TO CONTINUE TO WITHHOLD SUCH
AMOUNTS AS WERE OTHERWISE DUE FROM
YOU TO MAGNESIUM PRODUCTS INC AT THE
CLOSE OF BUSINESS ON 14 OCTOBER 1944
WHICH AMOUNTS I UNDERSTAND TOTAL NOT
LESS THAN \$24462.24

YOU ARE TO WITHHOLD NO ADDITIONAL
AMOUNTS UNTIL 30 OCTOBER 1944 ON WHICH
DATE YOU ARE TO RESUME WITHHOLDING
IN ACCORDANCE WITH MY LETTER OF 6 SEP-
TEMBER 1944 UNTIL THE TOTAL OF AMOUNTS

WITHHELD THROUGH 14 OCTOBER 1944 AND
AFTER 30 OCTOBER 1944 IS \$33500

2301Z

6 1944 \$40000 14 1944 \$24462.24 30 1944 6 1944 14
1944 30 1944 \$33500

RELAY EC 160738PWT

38880C

[Written]: Received 10.10 AM. 10/17/44. P. L.
Levengood. [17]

[EXHIBIT "D"]

AAF RESIDENT REPRESENTATIVE

S. G. ANSPACH

TWX TO WASHINGTON, D. C.

OCTOBER 17, 1944

TWX - ROBERT P. PATTERSON

UNDER SECRETARY OF WAR

WASHINGTON, D. C.

TWX-891 RE TWX LA V WARG NR166 WD, OCTOBER 14, 1944, MODIFYING LETTER OF SEPTEMBER 6, 1944 DIRECTING CONTRACTOR TO WITHHOLD FROM MAGNESIUM PRODUCTS, INC. CONTRACTOR REPORTED TO CHAIRMAN WDPAB ON OCTOBER 16, 1944 THAT WITHHOLDING AS OF OCTOBER 10, 1944 WAS \$16,866.43. IT IS ESTIMATED THAT THIS FIGURE DID NOT MATERIALLY INCREASE BE-

TWEEN OCTOBER 10 AND OCTOBER 14. THIS IS AT VARIANCE WITH YOUR UNDERSTANDING THAT CONTRACTOR WITHHELD NOT LESS THAN \$24,462.24, AND IT IS BELIEVED THAT LARGER FIGURE MAY INCLUDE AMOUNTS BEING HELD BY OTHER CONTRACTORS. MAGNESIUM PRODUCTS, INC. ADVISES TODAY THAT IT WILL NOT DELIVER CASTINGS HENCEFORWARD UNLESS PAYMENT IS MADE ON DELIVERY AND THAT IT WILL NO LONGER WAIVE THIS REQUIREMENT AS IT PREVIOUSLY DID. CONSEQUENTLY, YOUR IMMEDIATE ANSWER IS REQUESTED SO THAT THE CONTRACTOR CAN BUY ON COD BASIS UNTIL OCTOBER 30, 1944,

NORTH AMERICAN AVIATION, INC.
S. G. ANSPACH
SECRETARY - ASST. TREASURER

FBS:vs

cc: Mr. Paul Levengood
Mr. R. Nagely - 2
Mr. F. B. Stone - 3 [18]

[EXHIBIT "E"]

TXXXINGLE 7082 GA PLS
INGLE 7082 V LA 388 NR 1
LA284
WA307
LA V WARA NR59 WD
FROM ROBERT P PATTERSON UNDER SW
WASHINGTON DC 918125Z
TO NORTH AMERICAN AVIATION INC INGLE-
WOOD CALIF

GRNC

REFERENCE YOUR TELEGRAM 17 OCTOBER
FROM JOHNSON STOP MY TELEGRAM 14 OC-
TOBER RESPECT TO MAGNESIUM PRODUCTS
INC WITHHOLDING IS HEREBY AMENDED TO
REFER TO TOTAL OF NOT LESS THAN
\$16 866.43 IN LIEU OF \$24 462.24 STOP RESPECT
COD DELIVERY REFERENCE IS MADE TO LET-
TER DATED 13 OCTOBER FROM MAGNESIUM
PRODUCTS INC RUFUS BAILEY SECRETARY
TO DEPARTMENT OF JUSTICE WHICH AGREES
THAT DURING PERIOD BETWEEN 13 OCTOBER
AND 30 OCTOBER SALES TO YOU WILL BE ON
QUOTE CUSTOMARY CREDIT TERMS UN-
QUOTE END

1840Z

17 14 \$16 866.43 \$24 462.24 13 13
:: INGLE 7082 R 1 BW TNX
T
39043C

[Written]: Rec'd at 12; B.P. Rec. 10/20/44, 8:15
A. M. PBL [19]

[EXHIBIT "F"]

ACCOUNT

BETWEEN MAGNESIUM PRODUCTS, INC. - CR.
AND NORTH AMERICAN AVIATION INC. - DR.

<u>Invoice Date</u>	<u>Invoice No.</u>	<u>Amount</u>	<u>Date Due</u>	
8/31/44	71185	\$ 22.55	9/10/44	Net
"	71186	32.78	"	"
"	71187	487.52	"	"
"	71188	95.92	"	"
"	71189	29.48	"	"
"	71190	1,283.70	"	"
9/ 1/44	71213	6.05	10/10/44	"
"	71214	113.08	"	"
8/22/44	70947	63.80	9/10/44	"
"	70949	118.80	"	"
8/28/44	71077	850.60	"	"
9/ 6/44	71261	9.30	10/10/44	"
"	71262	134.64	"	"
"	71263	5.61	"	"
"	71264	289.30	"	"
"	71265	96.00	"	"
"	71266	1,536.00	"	"
"	71267	239.58	"	"
"	71268	63.36	"	"
"	71269	17.60	"	"
"	71270	1,266.54	"	"
"	71278	576.00	"	"
9/ 7/44	71279	540.32	10/10/44	"
"	71280	583.66	"	"
"	71281	11.88	"	"
"	71282	82.28	"	"

<u>Invoice Date</u>	<u>Invoice No.</u>	<u>Amount</u>	<u>Date Due</u>	
"	71283	7.70	"	"
"	71285	424.16	"	"
9/ 8/44	71296	65.12	"	"
"	71297	19.36	"	"
"	71298	19.36	"	"
"	71299	208.12	"	"
"	71300	1,240.58	"	"
"	71301	438.02	"	"
"	71302	408.00	"	"
"	71303	1,032.00	"	"
9/11/44	71320	843.48	"	"
"	71321	11.12	"	"
"	71322	143.00	"	"
"	71323	2,592.00	"	"
9/12/44	71324	148.06	"	"
"	71325	518.10	"	"
9/13/44	71343	268.62	"	"
"	71344	1,230.24	"	"
9/14/44	71349	9.90	"	"
"	71350	9.68	"	"
"	71351	8.58	"	"
"	71352	64.02	"	"
"	71353	395.34	10/10/44	"
"	71354	143.88	"	"
9/15/44	71389	118.80	"	"
[20]				
9/19/44	71427	\$ 11.88	10/10/44	Net
"	71428	85.06	"	"
"	71429	41.14	"	"
9/28/44	71513	12.76	"	"
1/25/45	73402	45.20	2/10/45	"

<u>Invoice Date</u>	<u>Invoice No.</u>	<u>Amount</u>	<u>Date Due</u>	
1/29/45	73072	117.52	"	"
1/23/45	72888	5.00	"	"
2/ 2/45	73157	73.45	3/10/45	"
2/ 8/45	73261	197.75	"	"
2/ 9/45	73272	1.14	"	"
2/12/45	73274	50.85	"	"
2/13/45	73277	85.88	"	"
"	73278	56.50	"	"
2/16/45	73351	291.54	"	"
2/22/45	73433	148.03	"	"
2/26/45	73489	196.62	"	"
2/27/45	73496	148.03	"	"
3/ 6/45	73562	33.90	4/10/45	"
3/19/45	73694	529.97	"	"
3/22/45	73729	697.21	"	"
3/31/45	73824	233.91	"	"
3/31/45	73825	449.56	4/10/45	"

Less our Returned Material Debit :

9/ 9/44	441 CR 107240	-240.00
8/28/44	441 CR 116165	-1,968.00
1/23/45	Our D/M	
	451 CR 90110	-24.46

\$20,204.03

[21]

Received copy of the within Answer this July 31, 1945.
Rufus Bailey, Attorney for Plaintiff.

[Endorsed]: Filed Jul. 31, 1945. [22]

[Title of District Court and Cause]

MOTION FOR SUMMARY JUDGMENT

The pleadings herein having been closed, plaintiff moves the Court for a summary judgment in favor of plaintiff herein upon the grounds and for the reasons that: (a) the answer leaves undenied all of the material allegations of plaintiff's complaint in that defendant's sole defense is based upon acts done and threatened to be done under color of the provisions of the Renegotiation Act which said Act is void and unconstitutional as being unauthorized and violative of the constitution of the United States of America as more fully set forth in plaintiff's memorandum of points and authorities in support of this motion, served and filed concurrently herewith, and (b) upon the further ground that the affirmative defenses of the defendant herein are barred by the [23] statute of limitations set forth in said Renegotiation Act.

Plaintiff further moves that this motion be heard and determined before trial.

BAILEY & POE

By Rufus Bailey

By Arlo D. Poe [24]

Received copy of the within. Flint & Mackay, Nov. 17, 1945. By LK.

[Endorsed]: Filed Nov. 19, 1945. [25]

[Title of District Court and Cause]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To the Defendant above named and to Flint & Mackay
and Edward L. Compton, its attorneys of record:

You are hereby notified that on the 10th day of December, 1945, the plaintiff will bring a motion for summary judgment on for hearing before the Honorable J. F. T. O'Connor, Judge of the above entitled court at his court room at United States Courts and Post Office Building, Los Angeles, California, at 10:00 o'clock A. M. of that day, or as soon thereafter as counsel can be heard.

Said motion will be made upon the motion for summary judgment, the affidavit of E. R. Clayton, and plaintiff's memorandum of points and authorities in support of motion for summary judgment, copies of which are served concurrently herewith and [26] upon all of the pleadings and files herein.

Dated: November 8, 1945.

BAILEY & POE

By Rufus Bailey

By Arlo D. Poe [27]

Received copy of the within. Flint & Mackay, Nov. 17, 1945. By LK.

[Endorsed]: Filed Nov. 19, 1945. [28]

[Title of District Court and Cause]

AFFIDAVIT OF E. R. CLAYTON IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of California, County of Los Angeles—ss:

E. R. Clayton being first duly sworn deposes and says:

That he is now and continuously ever since the 6th day of December, 1938, has been the president of Magnesium Products, Inc., the plaintiff herein; that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business located at 1119 Santa Fe Avenue, Los Angeles, California.

That at all of the times herein mentioned Henry L. Stimson was the duly appointed, qualified and acting Secretary of War of the United States of America and as such was charged with the duty of administering the Renegotiation Act. [29]

That at all of the times herein mentioned Robert P. Patterson was the duly appointed, qualified and acting Under Secretary of War of the United States of America and as such was also charged with the duty of administering said Renegotiation Act, by direction of and delegation by said Henry L. Stimson as the Secretary of War; that with respect to the matters involved in this action said Robert P. Patterson, as Under Secretary of War, did at all times purport to act by virtue of authority delegated to him by said Henry L. Stimson as the Secretary of War.

That plaintiff is engaged in the business of operating a jobbing foundry wherein it fabricates and sells magnesium alloy sand castings; that all of the business done by plaintiff during the times herein mentioned, ending November 30, 1942, was with private individuals, firms and corporations and not with the United States of America; that plaintiff had no contracts, as such, with any person, firm or corporation or with the United States of America; that all of its said business is and was done upon purchase orders, forwarded to plaintiff by its customers; that all of the magnesium alloy sand castings fabricated and sold by plaintiff, during the times herein mentioned, were sold below the maximum price which had been established and was in effect under the Emergency Price Control Act of 1942, as amended, and were sold at a price below the January 1, 1941, selling price.

Affiant is informed and believes and therefore alleges the fact to be that said Unilateral Determination (Exhibit A to Defendant's Answer), included the total of plaintiff's business done for its fiscal year ending November 30, 1942, without regard to whether each purchase order involved \$100,000.00 as required by said Renegotiation Act; that plaintiff at no time had a single purchase order or contract with defendant for \$100,000.00 or more;

That the products produced by plaintiff are standard commercial products which are identical in every material respect with [30] the products which are manufactured and sold, as a competitive product by hundreds of other manufacturers throughout the United States and which were in general civilian, industrial and commercial use prior to January 1, 1940; that the products produced by plaintiff were unchanged in any material respect by the

war and were consistently sold at a price not in excess of the January 1, 1941, selling price; affiant is informed and believes and therefore alleges that its selling prices were, during all of the times herein mentioned, well below said ceiling price and far below the prices charged by any other magnesium sand casting foundry in this or any other market area; in this regard affiant is informed and believes and therefore alleges the fact to be that its prices are the lowest in the entire United States; plaintiff's costs have been reduced over a long period of years and as these reductions have occurred its selling prices have been correspondingly reduced.

Plaintiff's operations at all times herein mentioned have been conducted with its own funds and personnel and without any direct or indirect financial assistance from the government and plaintiff has at all times promptly and fully met its obligations to the government of the United States of America, including the full payment of all taxes which plaintiff believes it owed to the government, which, for 1942, were paid in the amount of \$381,592.38.

Plaintiff has, in conducting its operations in the war effort, expended considerable effort and expense in assisting smaller concerns and has made available to them plaintiff's engineering and technical staffs, supplies and equipment; that plaintiff has not materially increased its total compensation for its officers and executive employees since 1941 even though the operations of plaintiff have greatly increased and the resulting responsibility and burden on those officers and employees has been correspondingly increased.

Plaintiff has supplied castings in an open competitive market and has, since October 1941, consistently sold at

a price [31] below the O.P.A. ceiling as set by Maximum Price Regulation No. 125. In 1940 plaintiff voluntarily established a blanket price for all magnesium castings of \$2.35 per pound; this price was made without regard to the difficulty of castings or intricacy of design; in 1941 plaintiff voluntarily reduced the blanket price to \$2.30 per pound; in January of 1942 plaintiff voluntarily reduced its price to \$2.25 per pound; in February of 1943 plaintiff complied with the O.P.A. request for reduction of 3¢ per pound based upon its computation of savings due to the roll back in the ingot price of magnesium of 2¢ per pound. This price of \$2.22 per pound was well below the ceiling price and far below the price charged by plaintiff's competitors in this or any other market area.

The plaintiff, in July of 1943, voluntarily reduced the price of all castings to \$2.00 per pound thereby effecting a saving to its customers, for the balance of the fiscal year, of approximately \$70,000.00. This saving more than offsets the amount of recovery sought by renegotiation and was made by plaintiff as a means of settling this controversy.

That on June 6, 1944, the said Robert P. Patterson, as the Under Secretary of War, acting and purporting to act by virtue of the authority delegated to him by the said Henry L. Stimson as the Secretary of War, and acting and purporting to act under said Renegotiation Act, did make an order purporting to determine excess profits alleged to have been made by plaintiff during the last eight months of its fiscal year ending November 30, 1942; that a copy of said order is attached as Exhibit A to De-

fendant's answer and by this reference incorporated herein as though set forth in full at this portion of affiant's affidavit.

That at all times herein mentioned Henry H. Arnold was and now is a duly commissioned General in the United States Army and the Commanding General of the Army Air Forces of the United States and is the same person designated in said Exhibit A as the "Commanding [32] General, Army Air Forces".

That at all times herein mentioned Brehon B. Somervell was and now is a duly commissioned General in the United States Army and the Commanding General of the Army Service Forces of the United States and is the same person designated in Exhibit A as the "Commanding General, Army Service Forces".

Affiant is informed and believes and upon such information and belief alleges the fact to be that pursuant to said Renegotiation Act the said Henry L. Stimson did, on the 30th day of June, 1942, delegate to said Robert P. Patterson, as the Under Secretary of War, all of the authority and discretion conferred upon Henry L. Stimson, as the Secretary of War; that on the 30th day of June, 1942, the said Robert P. Patterson designated the war Department Price Adjustment Board as the coordinating agency to determine and eliminate by renegotiation excessive profits and delegated to said Henry H. Arnold as the Commanding General, Army Air Forces, the authority to create certain subagencies and Price Adjustment Boards and redelegated the authority conferred by the Renegotiation Act to said Price Adjustment Boards.

That at all times herein mentioned the "renegotiations" herein referred to were conducted in the first instance by the Army Air Forces sitting in Los Angeles, California, subsequently by a Price Adjustment Board sitting in Washington, D. C., and subsequently by a Price Adjustment Board sitting in Los Angeles, California, which Boards were appointed or designated, and were and are purporting to act by virtue of authority and discretion delegated to them by said Robert P. Patterson.

That the said Robert P. Patterson, as is disclosed by Exhibit A attached to Defendant's answer, reached his conclusion through a consideration of financial operating and other data obtained from governmental or other sources unknown to plaintiff; that said Robert P. Patterson has wholly failed and neglected to [33] inform plaintiff as to what financial operating and other data he took into consideration or how he used it or what weight he gave to it; in this regard plaintiff alleges that said Robert P. Patterson and the above named Boards reached their conclusions arbitrarily, capriciously, unreasonably and in violation of plaintiff's legal rights.

That the renegotiation proceeding for plaintiff's fiscal year, November 30, 1942, was commenced on April 17, 1943, by the mailing to plaintiff of the notice attached hereto as Exhibit A; that on the date shown thereon plaintiff mailed to said Board the original of Exhibit B attached hereto, together with the data described therein; that thereafter the first conference was held concerning said renegotiation proceedings between plaintiff and said Board on May 18, 1943, as is disclosed by Exhibit C attached hereto.

The plaintiff herein has never agreed or assented to said renegotiation or the determination of any alleged excessive profits or the amount thereof but on the contrary has expressly refused to agree thereto and has at all times consistently maintained that it was not subject to said Renegotiation Act and that, in truth and in fact, it has not received or realized any excessive profits; plaintiff has consistently maintained and asserted that, as and if applied to the plaintiff or to the business or transactions of the plaintiff, said Renegotiation Act and each and every section and subdivision thereof are, and each of them is, void and unconstitutional as being unauthorized and violative of the constitution of the United States of America and that neither Henry L. Stimson, Robert P. Patterson, Henry H. Arnold nor Brehon B. Somervell had the power or authority to make said Unilateral Determination of June 6, 1944, (Exhibit A to Defendant's Answer herein), nor said direction to withhold of September 6, 1944, (Exhibit B to Defendant's Answer) or either of them and that none of said last named persons have the power or authority to enforce said Unilateral Determination according to its terms or otherwise for the reason that said [34] Renegotiation Act is unconstitutional and void, without lawful effect and repugnant to the constitution of the United States of America.

That plaintiff filed with the Tax Court of the United States its petition for redetermination of excessive profits under the Renegotiation Act on September 1, 1944, and said petition has been assigned Docket No. 61-R; that thereafter Henry L. Stimson as Secretary of War, and Robert P. Patterson as Under Secretary of War, filed their answer to said petition; that said petition is now

pending before the Tax Court of the United States but has not been calendared for hearing nor has any determination been made on its merits.

E. R. CLAYTON

Subscribed and sworn to before me this 8th day of November, 1945.

(Seal)

WINIFRED HOLLAND

Notary Public in and for said County and State [35]

[EXHIBIT A]

Address Reply To:

Western District Supervisor

Attention:

Price Adjustment Sect.

File No. 1399

Budget Bureau No. 49-R070-43

Approval Expires Dec. 31, 1943

ARMY AIR FORCES

COMMAND

MATERIEL ~~CENTER~~

WESTERN PROCUREMENT DISTRICT

3636 Beverly Boulevard

Los Angeles, California

April 17, 1943

Magnesium Products, Inc.

1119 South Santa Fe Avenue

Los Angeles, California

Gentlemen :

Pursuant to an Act of Congress (Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942, approved October 21, 1942) Price Adjustment Boards have been established within the War Department, The Navy Department, the Maritime Commission, and the Treasury Department. The function of these Boards is to review the profits earned on Government business by individuals or corporations who are parties to contracts for the production or supply of war products.

In the interest of simplicity, the four above-mentioned Departments have agreed that there should be delegated to this Section all renegotiations with your Company.

It is the view of the Board that this review can better be made by an overall study of your Company's financial position and your profits (past and prospective) from your war contracts as a whole, subdivided only as to fixed-fee and fixed-price contracts, than by an analysis of each individual contract on a unit cost basis.

For preliminary study will you please send us within fifteen days :

- a. Copies of your regularly prepared financial reports including balance sheets and income and surplus accounts for the years 1936 to 1942, inclusive.
- b. A copy of your latest balance sheet and of your income account or operating statement for the current year to the most recent date available.

In order not to burden your company, these reports need not be set up in tabulated form. Copies of your regular audited statements with the auditor's comments, or if these are not available, your published reports to stockholders should give us all the information necessary for our preliminary study. [36]

After we have had an opportunity to study this material, it will be our purpose to arrange a meeting with you and any financial or other officers whom you may wish to include, in order that we may develop a mutually satisfactory basis for review.

It may be that a preponderant portion of your production is for some Service or Department other than the Army Air Forces. If so, we shall appreciate your advising us thereof before preparing the data requested above.

Very truly yours,

E. A. MATTISON

Major, Air Corps

Chief Price Adjustment Section

G. M. Chipman

G. M. CHIPMAN

Captain, Air Corps

Price Adjustment Section [37]

[EXHIBIT B]

May 6, 1943

Army Air Forces,
Materiel Command,
Western Procurement Dist.,
3636 Beverly Blvd.,
Los Angeles, California.

Reference:
Price Adjustment Sec.
File: 1399

Attn: Mr. J. W. Chapple

Gentlemen:

Pursuant to your letter of April 17, 1943 and our telephone conversation of this week, we are enclosing herewith, balance sheets and P and L's for the fiscal years ended November 30, 1939, 1940, 1941, 1942.

We trust that you find these satisfactory for your re-negotiation purposes and we shall expect to hear from you in the near future for an appointment to go into further details.

Very truly yours,

MAGNESIUM PRODUCTS, INC.,

By E. R. Clayton

ERC:HH

President [38]

[EXHIBIT C]

May 25, 1943.

Special Delivery

Army Air Forces
Materiel Command
Western Procurement District
3636 Beverly Blvd.
Los Angeles, California.

Reference: Price Adj. Section
File No. 1399

Attention: Mr. J. W. Chapple

Gentlemen:

As per request in Price Adj. Section Form 2, which you gave us at conference May 18th, our "Contractors Letter" is as follows:

History

In the fall of 1938, Mr. K. T. Vanganes, who had ten years prior experience in aircraft manufacture, production control and purchasing, interested the writer in the financing of our present Magnesium Products, Inc. At that time all the magnesium sand castings required for our local aircraft companies were made by the Dow Chemical Company's foundry at Bay City, Michigan, or at American Magnesium Company's foundry in Cleveland, Ohio, or at Bendix foundry at Bendix, New Jersey.

Our idea was that there could be developed sufficient aircraft and commercial business to support a local foun-

dry which would help the local manufacturers from both a price and time saving basis. We visited The Dow Chemical Company in Midland and Bay City and after proving our financial ability to perform in a manner satisfactory to them and their customers in California they granted us a license to operate a sand casting foundry and agreed to furnish us with one of their specially trained metallurgists thoroughly competent to handle any phase of any magnesium operation. The man we all agreed on was Mr. L. M. Nash who had ten years experience in all departments of their magnesium operation. Mr. Nash has been our metallurgist and general superintendent since January 1939.

At this time we asked the Dow Chemical Company for a sales contract to represent them on a manufacturers basis in California on their line of wrought magnesium products namely: sheet, extrusions, forgings and fabricated parts. The reply was that we would first have to demonstrate [39] to them that we could successfully operate a foundry and promote the sale of magnesium in this territory. About July of 1939 on inspection of our plant and operations we were awarded a sales contract on a year to year basis which we have enjoyed to the present time.

Mr. Vanganes and the writer returned from the visit to Dow in October 1938 and with my personal funds we started to purchase the necessary foundry and heat treating equipment to start operations.

The writer owns the building at 1119-1125 Santa Fe Avenue and we asked the tenant, Callahan Engineer Company to move out so that we could start the foundry operation. In using this building we acquired considerable machinery, air lines, 400 amp. electric service, overhead rail and hoist and office equipment which enabled us to get started on our small initial capital. During the first years operation we were some 10 to 12 thousand dollars in the red which was supplied by the writer on open note basis. The steady expansion which has occasioned since the first year is apparent from the statements in your possession. All capital was furnished either by the writer or from profits which we accumulated. No dividend was paid until November 1942.

We believe that we have been largely responsible for the rapid growth of the use of magnesium in this territory then our years of educational and sales promotional work on the engineering and purchasing staffs of the local aircraft companies. We have always tried not to oversell the material and to deliver a product which was better than the specification requirement.

Thru the years we have had to anticipate the requirements of our customers to some extent, in order to be ready to turn out the necessary poundage without serious delay. The expansions required foundry production equipment such as jolt squeeze and roll over machines and heat treating equipment and the training of personnel.

A good deal of the business of 1942 and 43 was practically forced upon us, due to the opening of large branches of Douglas, North American, Boeing and Vultee in the Eastern territory. We had the only set of patterns for some of these ships and to make new patterns and prove them and secure a new source of supply would have entailed added costs and a delay of 4 to 6 months. It has been quite a struggle to keep up with the required deliveries due to this reason.

PRICE

In 1939 as far as we could ascertain the price on selective castings basis was from \$2.50 to \$5.00 per pound. We started on a \$2.50 per pound basis and in the first year we voluntarily established for large users a price of \$2.35 per pound for all castings of over 3 ounces weight. The minimum on these small castings of less than 3 ounces 55c each. About 1940 we voluntarily established a "Blanket Price" of \$2.35 for large accounts. This had the effect of saving large amounts of time formerly consumed both by our own cost and billing departments and by the aircraft companies cost [40] accounting and estimating departments. About 1941 we voluntarily reduced the blanket price to large users to \$2.30. Another voluntary reduction to \$2.25 followed about January 1942. On February 1st of 1943 we complied with the O.P.A. request for a reduction of 3¢ per pound based on their computation of savings due to the reduction in ingot price of 2¢ per pound.

COOPERATION

We have during our entire history cooperated with our competitors in sharing with them the knowledge and designs for special equipment necessary to turn out a satisfactory product. This is proven by the fact that with the exception of the local American Magnesium Plant all the men in charge of our competitors' foundries were exemployees of this company at one time and were trained under our system by Mr. Nash. Many of their molders, coremakers, heat treaters and finishers had this training in our plant. During the 1942 shortage of materials we, on many occasions, kept local plants open by loaning them from our stocks magnesium ingot, melting fluxes, crucibles and other materials. These loans were on a free basis and all that we received was the return of the same amount of material. We have been instrumental in reducing the cost to all of us on melting crucibles from \$35.00 in 1939 to \$10.00 at present.

FUTURE OPERATIONS

We are of the opinion that magnesium is in its infancy, that it is hazardous and we believe we would never have crowded the large amount of production equipment into our small plant except for the urgent needs of war necessity. We believe that it will not be possible to operate on our present three shift six day basis economically in the post war era. We will have considerable amounts of excess machinery for which we do not hold a certificate of necessity. For these reasons we believe

that our present operations are of the so called "War Baby" Class and should be entitled to a larger percentage of profit than more stable established lines.

In December 1942 we suffered a disastrous fire which destroyed our entire cleanup and shipping department just completed in August 1942. This represents about 20% of our entire floor space. We only lost three days operation in the foundry and sub-contracted the cleanup work. We had the building entirely rebuilt and new machinery in operation in exactly 30 days time. In the next 60 days we caught up and passed the entire production lost in December.

Trusting this is the information desired and assuring you *or* our continued cooperation, we are

Very truly yours,

MAGNESIUM PRODUCTS, INC.

By E. R. Clayton

ERC:HG

President [41]

Received copy of the withn. Flint & Mackay, Nov. 17, 1945. By L.K.

[Endorsed]: Filed Nov. 19, 1945. [42]

[Title of District Court and Cause]

RESPONSE TO CERTIFICATION AND MOTION
BY UNITED STATES TO INTERVENE

Comes now the United States of America by its Assistant Attorney General, John F. Sonnett, and its attorney for the Southern District of California, Charles H. Carr, and says:

1. The United States of America, pursuant to the Act of August 24, 1937 (28 U. S. C. 401) and Rule 24 of the Federal Rules of Civil Procedure, moves to intervene and become a party herein for the purposes and with all the rights provided by said Act of August 24, 1937, and by said Rule 24, on the following grounds:

(a) That the constitutionality of an Act of Congress, the [43] Renegotiation Act, [Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress) approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; by Public 149, 78th Congress, approved July 14, 1943; and as amended in full by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress, enacted February 25, 1944)] affecting the public interest is drawn in question in this action and neither the United States, nor any agency

thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto; and

(b) That in accordance with Rule 24 (b) (2) of the Federal Rules of Civil Procedure, the United States has claims and defenses which present questions both of law and of fact which are common to the main action. The intervention of the United States will not unduly delay or prejudice the adjudication of the rights of plaintiff or defendant in this action.

2. Annexed hereto in accordance with Rule 24 (c) of the Federal Rules of Civil Procedure is a pleading entitled "Answer of the United States." The United States moves that said pleading be deemed the appearance of the United States in support of the constitutionality of the Act of Congress herein drawn in question, and in opposition to all pleadings, motions, and proceedings of the parties hereto that have been or may be made in so far as said pleadings, motions, or proceedings are based on the contention that said Act of Congress is in any respect, or in any application, unconstitutional; and that said pleading be deemed the appearance of the United States for the purpose of asserting its claims and defenses under the Federal Rules of Civil Procedure, and in opposition to all pleadings, motions, and proceedings of the parties hereto that have been made or may be made herein in so far as said pleadings, motions, or proceedings relate to said claims or defenses.

3. The United States moves for leave to make such motions [44] and take such other proceedings as it may deem appropriate or desirable and to present evidence in support of the allegations of its answer and as the Act of August 24, 1937 provides.

JOHN F. SONNETT

Assistant Attorney General

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

Attorneys for United States

[Endorsed]: Filed Jan. 18, 1946. [45]

[Title of District Court and Cause]

NOTICE

To: Rufus Bailey, Arlo D. Poe, 639 South Spring Street,
Los Angeles 14, California, Attorneys for Plaintiff.

To: Flint & Mackay, 12th Floor Rowan Building, 458
South Spring Street, Los Angeles, California, At-
torneys for Defendant, North American Aviation,
Inc.

You Will Please Take Notice that on Monday, the 28th day of January, 1946, at the hour of 10:00 o'clock in the forenoon of said day or as soon thereafter as counsel may be heard, the undersigned attorneys for the United States of America will appear before the [46] Honorable J. F. T. O'Connor in the Courtroom usually occupied by him in the United States Court House, Los Angeles, California, and will then and there present the motion of the United States for leave to intervene in the above-entitled cause, the answer of the United States, as intervenor, to the complaint in said cause, and will then and there move the Court to enter an order allowing intervention by the United States, copies of which said motion, answer, and proposed order are attached hereto.

JOHN F. SONNETT

Assistant Attorney General

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

Attorneys for United States

[Endorsed]: Filed Jan. 18, 1946. [47]

[Title of District Court and Cause]

ORDER ALLOWING INTERVENTION BY
UNITED STATES

This cause came on to be heard on the motion of the United States to intervene and for other relief, and the Court being satisfied that the United States has the right to intervene and become a party herein under the provisions of the Act of August 24, 1937 (28 U. S. C. 401), and under the provisions of Rule 24 of the Federal Rules of Civil Procedure.

It Is Ordered:

1. That the motion of the United States is in all respects granted;

2. That the United States is hereby made a party to this [49] cause for the purposes and with all the rights provided by said Act of August 24, 1937, and by the Federal Rules of Civil Procedure, and that the United States shall receive notice of all proceedings herein;

3. That the Answer of the United States, annexed to said motion, is deemed the appearance of the United States in support of the constitutionality of the Act of Congress herein drawn in question, to wit, the Renegotiation Act; and in opposition to all pleadings, motions, and proceedings of the parties hereto that have been or may be made in so far as said pleadings, motions, or proceedings are based on the contention that said Act of Congress is in any respect, or in any application, unconstitutional; and that such Answer of the United States is deemed the appearance of the United States for the purpose of asserting its claims and defenses under Rule 24 (b) (2) of the

Federal Rules of Civil Procedure; and in opposition to all pleadings, motions, or proceedings of the parties hereto that have been made or may be made herein in so far as said pleadings, motions, or proceedings relate to said claims or defenses;

4. That leave is granted to the United States to make such motions and take such other proceedings as it may deem appropriate or desirable and to present evidence at the trial in support of the allegations of its answer and in the manner provided by said Act of August 24, 1937.

Done in open Court this 28 day of January, 1946.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Jan. 28, 1946. [50]

[Title of District Court and Cause]

ANSWER OF THE UNITED STATES

The United States of America, intervenor herein, for its pleading in intervention alleges as follows:

1. By certificate dated November 19, 1945, the Honorable J. F. T. O'Connor, Judge of the United States District Court, certified to the Attorney General, pursuant to the Act of August 24, 1937 (28 U. S. C. 401), the fact that the constitutionality of the Renegotiation Act, an Act of Congress affecting the public interest, is drawn in question in this action.

2. Except by this intervention neither the United States nor any agency thereof nor any officer or employee thereof, as such officer [51] or employee, is a party to this action.

3. The Renegotiation Act affects the public interest for the following reasons among others:

(a) In the light of the experience acquired in the Revolutionary War, the Civil War and the World War, Congress concluded that the Renegotiation Act is the fairest and most effective method for eliminating excessive war profits.

(b) Effective control of war profits is an essential feature of a successful war program. The control of war profiteering is required to maintain morale, reduce the tax burden, control inflation, and stimulate efficient procurement practices.

(c) The United States has obtained refunds pursuant to the Renegotiation Act of excessive war profits in an amount greater than \$6,000,000,000, prior to tax adjustment. In 97.5% of the cases the contractor agreed to the determination made by the renegotiating officials.

FIRST DEFENSE

4. The Renegotiation Act was enacted pursuant to the war powers of Congress. It is constitutional and valid and all action taken pursuant thereto in determining the amount of excessive profits realized by plaintiff was in all respects lawful.

5. The Declarations of War with Germany, Italy, and Japan required the production of the weapons of war, the procurement of equipment and supplies for troops, the construction of camps and camp facilities and the procurement of the instruments of communication and transportation in the largest possible quantity with the greatest possible speed. The full industrial capacity of the United

States had to be converted immediately to the production of war material and to meet war objectives. The extent of the procurement problem is indicated by the fact that during the four months of July, August, September, and October, 1942, the War Department alone entered into over 1,400,000 contracts. In January, 1942, the total dollar value of contracts executed for war [52] purposes amounted to more than \$9,000,000,000 and in the remaining months of the fiscal year 1942 this figure never fell below \$4,800,000,000. On June 30, 1942, the outstanding obligations of the United States for war supplies and war facilities amounted to nearly \$43,000,000,000. Total expenditures of the War and Navy Departments for the fiscal year ending June 30, 1942, amounting to nearly \$23,000,000,000, exceeded the total military and naval expenditures of the United States from 1789 through the end of the World War.

6. The necessity for procuring war material adequate in quantity and available in time to permit this nation to avert grave military reverses required that ordinary procurement procedures be drastically modified. Negotiation of contracts was substituted for advertising for bids; letters of intent and letter contracts were widely employed to allow manufacturers to begin production prior to the execution of formal agreements; subcontracting and widespread distribution of war orders were required to utilize the full industrial capacity of the nation and procurement officials in the field were given full and final authority to execute contracts in very large amounts. The difficulties were enormously increased by the fact that modern warfare, mechanized and amphibious, has forced the development, production, and use of hitherto unknown weapons

and supplies. Furthermore, shortages and dislocation of labor and materials required wholesale revisions in established methods of production.

7. Under these circumstances accurate pricing was impossible. Many of the supplies and weapons were entirely new and as to these there was and could be no guiding cost or price experience. Many contractors were required to produce articles which they had never produced before and were thus required to convert their plants and to re-train their labor forces. Quantities, rates of delivery, and specifications were and had to be modified in the light of battle experience. These uncertainties were further increased by shortages and dislocation of labor and material supply. Under such circumstances, the contractor [53] was entitled to and did receive prices which would protect him against these innumerable hazards to production, although it was recognized that as experience was acquired, as conversion problems were solved, as labor was trained, as lines of supply were established, as design and specifications were crystallized, and as mass production was achieved, the cost of production would be greatly decreased and, therefore, that very large profits could be expected.

8. Renegotiation developed as the solution to the problem of meeting the procurement needs of the armed forces with the speed necessary to achieve military objectives, and at the same time eliminating excessive war profits which would place an undue burden upon the taxpayers of the nation, impair the national morale, and constitute a threat of war-time inflation. Prior to the enactment of the statute there had been numerous instances of voluntary

refunds to the Government of excessive profits and of voluntary renegotiation and revision of contract prices. The War and Navy Departments had, prior to the statute, established cost inspection divisions and had designated renegotiating officials whose duty it was to advise contracting officers concerning fair pricing for future contracts and to renegotiate prices under existing agreements. The Renegotiation Act made obligatory and gave the force of law, with power in the Government to make unilateral determinations and with such other modifications as the Congress thought desirable, to the practice which was developed by the Services and responsible members of the business community.

9. No rigid definition of excessive profits are possible. In fairness to the contractor and to the public, it was necessary that the ultimate price and the ultimate profit be fixed by an exercise of judgment in the light of the conditions peculiar to the individual contractor. Consideration had to be given to a great variety of circumstances, including the contractor's economy in the use of labor, plant facilities and raw materials, the contractor's efficiency in achieving quantity production at reduced cost, the war contribution of the contractor by invention [54] or by development of manufacturing technique, the quality and complexity of the item produced, the extent and character of subcontracting, the nature and amount of Government financing, the contractor's cooperation in meeting the changing problems of war production, the risks assumed by the contractor because of close pricing, large inventories, cut-backs in orders or modifications of specifications and such other factors as might at the time of the profit determination prove to be appropriate.

10. In order to achieve the purposes for which the statute was passed and to eliminate, so far as possible, unfair discrimination between contractors the Congress determined that it was necessary that the Act apply to contracts in existence on the date the legislation became effective, that is on April 28, 1942. On that date there were outstanding uncompleted war contracts under which the United States had obligations in excess of \$50,000,-000,000. It was in connection with these early contracts that the probability of excessive profits was greatest and accordingly, that the need for renegotiation was greatest.

11. All the considerations which required renegotiation of prices and profits arising from prime contracts apply with equal force to subcontracts.

12. In view of the great variety of war contracts and in order that the accounting burden might not defeat the ultimate objectives of the statute and in order that the renegotiation law itself should not by its rigidity impede the procurement of war supplies, it was necessary and advisable that the procuring agencies be empowered to act upon the classification of contracts established by the statute.

SECOND DEFENSE

13. This Court has no jurisdiction of any issue as to which the Tax Court is given jurisdiction by Section 403 (e) of the Renegotiation Act. That section permits any contractor or subcontractor dissatisfied with the administrative determination of his excessive profits to obtain [55] in the Tax Court of the United States a determination de novo of the amount of such profits and the Tax Court is given "exclusive jurisdiction, by order, to

finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Plaintiffs have filed a petition in the Tax Court for such redetermination but the Tax Court has not as yet heard or decided plaintiff's case. This suit is premature because plaintiff has not as yet exhausted its Tax Court remedy.

THIRD DEFENSE

14. The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

15. (a) The United States admits the allegations of paragraphs I and II of the complaint.

(b) During 1942, plaintiff was engaged in the manufacture of certain magnesium castings, all of which had a war end use. These magnesium castings were sold to defendant North American and others, and as plaintiff well knew they were used in the fabrication of aircraft and aircraft parts manufactured for and at the expense of the United States. After the enactment of the Renegotiation Act on April 28, 1942, plaintiff continued to enter into numerous purchase order contracts for the manufacture and sale of such castings and to make deliveries pursuant to those purchase orders.

(c) After due notice to plaintiff, proceedings for the renegotiation of plaintiff's contracts and subcontracts were had and conducted by representatives of the Secretary of War and thereafter, and on the 6th day of June, 1944, the Under Secretary of War, acting under and by virtue of

the Renegotiation Act and pursuant to authority delegated to him, duly determined, in accordance with law, that of the profits realized by plaintiff during its fiscal year ending November 30, [56] 1942 on its contracts and sub-contracts subject to renegotiation, \$250,000 thereof were excessive profits. A full, true and correct copy of the order and determination of the Under Secretary of War is attached hereto as Exhibit "A" and by this reference made a part hereof.

(d) The tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code is in the amount of \$184,376.63. This tax credit is computed upon the assumption that the profits determined to be excessive were returned as income by plaintiff for tax purposes and that the appropriate taxes have been or will be paid on such profits.

(e) On or about September 6, 1944, the Under Secretary of War mailed to defendant North American a "Direction to Withhold from Magnesium Products, Inc., of Los Angeles, California, pursuant to the Renegotiation Act." This withholding order was amended by a telegram from the Under Secretary of War to defendant North American, dated October 14, 1944, by a further telegram dated October 19, 1944, and by a letter dated July 21, 1945. Full, true, and correct copies of the order and its amendments are attached hereto as Exhibits "B", "C", and "D", and "E", and by this reference made a part hereof.

(f) The United States is informed and believes, and upon such information and belief alleges that pursuant to these directions from the Under Secretary of War defendant North American has withheld for the account

of the United States, from amounts otherwise due to plaintiff, the sum of \$20,204.03. And the United States further alleges that by reason of the orders and determinations made by the Under Secretary of War and described herein said sum of \$20,204.03 is not now owing to plaintiff but is owing to the United States.

(g) Plaintiff has filed a petition in the Tax Court of the United States asking for a redetermination of the amount, if any, of its excessive profits for its fiscal year ending November 30, 1942. The Tax Court has not as yet heard plaintiff's case or rendered any [57] decision thereon.

(h) The United States denies each allegation of the complaint not admitted, qualified, or specifically denied.

16. With respect to all matters in controversy in this suit, all action taken by Henry L. Stimson and Robert P. Patterson and by all persons acting for them or under their direction or on their behalf, was taken pursuant to and authorized or required by the Renegotiation Act.

FIFTH DEFENSE

17. The United States by this reference realleges as though fully here set forth each of the allegations contained in paragraphs 1 to 16, inclusive, of this answer.

18. By reason of the facts and circumstances set forth in this fifth defense, plaintiff has waived all right to contest the validity of the Renegotiation Act or the validity of the orders, directions and determinations of the Under Secretary of War, and all right to contend that there is any indebtedness owing to plaintiff from defendant North American.

SIXTH DEFENSE

19. The United States by this reference realleges as though fully here set forth each of the allegations contained in paragraphs 1 to 16, inclusive, of this answer.

20. By reason of the foregoing fact and circumstances set forth in this sixth defense, plaintiff is estopped from contesting the validity of the Renegotiation Act or the validity of the orders, directions and determinations of the Under Secretary of War, and from asserting that there is any indebtedness owing to plaintiff from defendant North American. [58]

SEVENTH DEFENSE

21. The United States by this reference realleges as though fully here set forth each of the allegations contained in paragraphs 1 to 16, inclusive, of this answer.

22. By reason of the foregoing facts and circumstances set forth in this seventh defense and because the Renegotiation Act has to do with the expenditure of the funds of the Federal Government, the matters in controversy in this answer are matters over which the executive and legislative branches of the Government have full, final, and exclusive authority.

For Answer to the Second and Separate Cause of Action in the Complaint, the United States Admits, Denies, and Alleges as Follows:

23. The United States incorporates herein and by this reference realleges as though fully here set forth each and all of the allegations heretofore set forth in this answer.

Wherefore, the United States prays that the Court adjudge and declare that the Renegotiation Act is constitutional and that the United States have such other and further relief as to the Court shall seem just and proper.

JOHN F. SONNETT

Assistant Attorney General

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant United States

Attorney [59]

EXHIBIT "A"

WAR DEPARTMENT

OFFICE OF THE UNDER SECRETARY

Washington

DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

Whereas, Magnesium Products, Inc., (hereinafter referred to as the Contractor) holds contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

Whereas, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its fiscal year ended 30 November 1942, under said contracts and subcontracts; and

Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, Therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under

subsection (f) thereof, it is hereby found and [60] determined:

That \$250,000 of the profits realized by the Contractor during its fiscal year ended 30 November 1942, under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

6 June 1944

(S) ROBERT P. PATTERSON

Robert P. Patterson

Under Secretary of War

SPRAR-8

5-17-44

Copy

24-55147 [61]

EXHIBIT "B"

SPRAR

6 September 1944.

North American Aviation, Inc.,
Inglewood, California

Subject: Direction to Withhold from Magnesium
Products, Inc., of Los Angeles, Cali-
fornia, pursuant to the Renegotiation
Act.

Gentlemen:

Pursuant to the authority vested in the Secretary of War under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and duly delegated to me, I found and determined on 6 June 1944 that certain of the prices and profits realized by Magnesium Products, Inc., during its fiscal year ended 30 November 1942 under contracts and subcontracts subject to renegotiation were excessive.

In accordance with the authority and duty to eliminate said excessive profits (after allowing to said Magnesium Products, Inc. credit for Federal taxes and provided in Section 3806 of the Internal Revenue Code) I hereby direct you to withhold for the account of the United States any and all amounts (not in excess of \$40,000 in the aggregate) otherwise due or which shall become due from you to said Magnesium Products, Inc.

This direction shall be effective immediately and shall continue in effect until further notice from me.

You are also directed to report in writing to the Chairman of the War Department Price Adjustment Board, Room 3D 573, The Pentagon, any amounts which you

may from time to time withhold for the account of the United States pursuant hereto.

Very truly yours,

ROBERT P. PATTERSON

Under Secretary of War

FF:hbb

Copy

[62]

EXHIBIT "C"

72867

ASF, PRICE ADJUSTMENT BOARD RENEGOTIA-
TION DETERMINATION SPRAR ROOM 3D 573,
THE PENTAGON, WASHINGTON 25, D. C.

NORTH AMERICAN AVIATION, INC.

INGLEWOOD

CALIFORNIA

14 OCTOBER 1944

MY LETTER 6 SEPTEMBER 1944 DIRECTING
YOU TO WITHHOLD \$40,000 FROM MAGNESIUM
PRODUCTS, INC. FOR ACCOUNT THE UNITED
STATES IS HEREBY AMENDED AS FOLLOWS:

YOU ARE TO CONTINUE TO WITHHOLD
SUCH AMOUNTS AS WERE OTHERWISE DUE
FROM YOU TO MAGNESIUM PRODUCTS, INC.
AT THE CLOSE OF BUSINESS ON 14 OCTOBER
1944 WHICH AMOUNTS I UNDERSTAND TOTAL
NOT LESS THAN \$24,462.24.

YOU ARE TO WITHHOLD NO ADDITIONAL
AMOUNTS UNTIL 30 OCTOBER 1944 ON WHICH
DATE YOU ARE TO RESUME WITHHOLDING
IN ACCORDANCE WITH MY LETTER OF 6

SEPTEMBER 1944 UNTIL THE TOTAL OF AMOUNTS WITHHELD THROUGH 14 OCTOBER 1944 AND AFTER 30 OCTOBER 1944 IS \$33,500.

ROBERT P. PATTERSON

UNDER SECRETARY OF WAR

OFFICIAL

G. K. HEISS

COLONEL, ORDNANCE DEPARTMENT

EXECUTIVE ASSISTANT

DRStuart; fm

COPY

[63]

EXHIBIT "D"

19 OCTOBER 1944

72868

ASF, PRICE ADJUSTMENT BOARD RENEGOTIA-
TION DETERMINATION SPRAR ROOM 3D 573,
THE PENTAGON, WASHINGTON 25, D. C.

NORTH AMERICAN AVIATION, INC.

INGLEWOOD

CALIFORNIA

REFERENCE YOUR TELEGRAM 17 OCTOBER
FROM JOHNSON STOP MY TELEGRAM 14 OC-
TOBER RESPECT TO MAGNESIUM PRODUCTS,
INC. WITHHOLDING IS HEREBY AMENDED TO
REFER TO TOTAL OF NOT LESS THAN
\$16,866.43 IN LIEU OF \$24,462.24 STOP RESPECT
COD DELIVERY REFERENCE IS MADE TO LET-

TER DATED 13 OCTOBER FROM MAGNESIUM
PRODUCTS, INC. RUFUS BAILEY, SECRETARY,
TO DEPARTMENT OF JUSTICE WHICH AGREES
THAT DURING PERIOD BETWEEN 13 OCTOBER
AND 30 OCTOBER SALES TO YOU WILL BE ON
QUOTE CUSTOMARY CREDIT TERMS UN-
QUOTE END

ROBERT P. PATTERSON
UNDER SECRETARY OF WAR

OFFICIAL:

G. K. HEISS
COLONEL, ORDNANCE DEPARTMENT
EXECUTIVE ASSISTANT

DRStuart; fm

COPY

[64]

EXHIBIT "E"

SPFEU 167/490428 Magnesium Products Inc.

21 July 1945

North American Aviation, Inc.

Inglewood, California

Gentlemen:

Receipt is acknowledged of your letter dated 6 July 1945, in which you state that you have withheld from Magnesium Products Company, 1119 South Santa Fe Avenue, Los Angeles 21, California, as of that date the sum of twenty thousand two hundred four dollars and

three cents (\$20,204.03), pursuant to the withholding directive of the Under Secretary of War.

Reference is made to withholding order dated 6 September 1944, whereby you were directed by the Under Secretary of War, to withhold monies otherwise due Magnesium Products Company in an amount not to exceed forty thousand dollars (40,000), as amended. Such withholding order is hereby further amended in that the maximum amount to be withheld from Magnesium Products Company is decreased from forty-thousand dollars (40,000) in the aggregate to twenty thousand two hundred four dollars and three cents (20,204.03) in the aggregate.

It is now requested that you continue withholding the twenty thousand two hundred four dollars and three cents (20,204.03), until further advice is received from this office as to disposition to be made of the amount withheld.

This office appreciates your cooperation in the matter.

Sincerely yours,

R. P. HUEPER

Brigadier General, USA
Acting, Fiscal Director

COPY

[Endorsed]: Filed Jan. 18, 1946. [65]

[Title of District Court and Cause]

MOTION FOR SUMMARY JUDGMENT

Comes now the intervenor, the United States of America, and moves for summary judgment on the ground that there is no genuine issue as to any material fact and the intervenor is entitled to judgment as a matter of law, and on the further ground that the complaint fails to state a claim upon which relief can be granted. The Court has no jurisdiction in this action of any issue as to which the Tax Court of the United States has jurisdiction under the provisions of the Renegotiation Act.

This motion is based upon the answer of the United States, the [66] affidavits filed in support of this motion, and upon the pleadings, files, and records in this case.

JOHN F. SONNETT

Assistant Attorney General

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

[Endorsed]: Filed Jan. 28, 1946. [67]

[Title of District Court and Cause]

AFFIDAVIT OF H. STRUVE HENSEL

City of Washington,

District of Columbia, ss:

H. Struve Hensel, being first duly sworn, deposes and says:

1. I have been Assistant Secretary of the Navy since January 30, 1945. The Secretary of the Navy has delegated to me, as Assistant Secretary, the general supervision over all of the procurement activities of the Department of the Navy. I was appointed a Special Assistant to the Under Secretary of the Navy in January 1941 and was appointed Chief of the Procurement Legal Division upon the formation of that Division in July 1941. When the name of the Procurement Legal Division was changed to the Office of the General Counsel for the Department of the Navy in August 1944, I was appointed General Counsel which position I held until my appointment as Assistant Secretary. As Chief of the Procurement Legal Division and General Counsel, I had general supervision over all of the procurement legal matters in the Department of the Navy and supervised the drafting of Navy contracts.

2. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

I. SCOPE AND COMPLEXITY OF NAVY PROCUREMENT.

3. The armed services in December 1941 were faced with procurement problems on a scale beyond anything which they had theretofore experienced. The problems of allocating materials and manpower were enormous. The Army and Navy urgently needed ships, planes, tanks and other munitions of every kind, regardless of cost. The logistics requirements had changed so much and so swiftly with the outbreak of war that the available data on the Government's [69] previous procurement were of very little assistance in fixing prices which would closely reflect the ultimate costs.

4. Prior to the emergency period, all Navy contracts were let as the result of competitive bidding. The first step away from this requirement was taken in the Act of April 25, 1939, when the Congress authorized construction of naval facilities on island bases on a cost-plus-a-fixed-fee basis. In the next fifteen months several further authorizations were enacted allowing the negotiation of cost-plus-a-fixed-fee contracts for construction.

5. The first major expansion in the Navy's war-procurement planning was in June 1940. Upon the fall of France and the Low Countries, the Congress voted to make substantial additions to the United States Fleet. By December 1941, Navy procurement programs had been accelerated as demands from the Fleet became more imperative. After December 7, 1941, the procurement tempo sky-

rocketed. So many different items were needed in such large quantities, by both the War and Navy Departments, that the Navy Department felt compelled to give a commitment to almost any manufacturer who demonstrated ability to perform the work.

6. In June and July, 1940, the authorized strength of the Navy was approximately doubled. The "11 percent Expansion Act" of June 14, 1940 and the "70 percent Expansion Act" of July 19, 1940 (the Two-Ocean Navy Act) were passed in recognition of the threats to this nation's security implicit in the German victories. These authorizations of increased Navy strength were accompanied by grants of contract authority and the necessary appropriations. The Act of June 28, 1940 (Public No. 671, 76th Congress) granted limited authority to negotiate contracts for vessels, propulsion machinery and equipment, and also [70] granted the necessary authority to construct facilities to build the vessels and munitions. Requests to the Congress for authority to negotiate contracts had emphasized that the Navy had need for utilizing the services of all shipbuilders, all manufacturers of naval ordinance and other munitions, rather than the services of only those making the lowest bids. In point of fact, the contracts let by the Bureau of Ships in late 1940 and the first half of 1941 to carry out the additions to the Fleet authorized by the Congress, in large part tied up the existing naval shipbuilding capacity of the nation. Although new shipbuilding facilities were being constructed and completed throughout the last half of 1940

and 1941, it was not until early 1942 that the completion of vessels on the ways and the availability of the new shipbuilding facilities made possible the execution of another large group of shipbuilding contracts.

7. The vastness of the procurement programs in 1941 and the early part of 1942, as compared with earlier programs, tended to subordinate all other considerations to the single factor of getting the munitions. The Navy did not during this period have any mechanisms for determining close contract prices or for controlling profits under its contracts. More important, neither the Navy personnel responsible for procurement nor the contractors had any experience to enable them to gauge profits accurately. Many contractors were making new items which had never before been manufactured in this country. Manpower problems began to be acute with the acceleration of inductions under the Selective Service Act. No one had any idea as to what effect manufacture of ordnance and other items by the thousands instead of by single items or in small lots would have on profits. It proved generally impossible to make allowance in [71] advance for increased efficiency gained from experience, and the greater profits, resulting from increased volume. In instance after instance the Navy found that costs and profits seemingly reasonable at the start of the contract became unreasonable after volume and experience had increased. The important contracts were so large that a small margin of error in computing prices could wipe out the contractor's capital. Conversely, allowances for con-

tendencies, intended only for protection, often turned into unexpected profits. Finally, Navy personnel during this period were more interested in getting the munitions than in limiting profits under the contracts for such munitions.

a. Contract Statistics

8. The scope of the problem of acquiring naval supplies and equipment at reasonable prices can be discovered by examination of some Navy statistics for this period.

i. Commitments and expenditures

9. For the calendar years 1940-1944, the Navy's commitments and expenditures of appropriated funds were as follows (in billions of dollars):

	Fiscal 1940	Fiscal, 1941		Fiscal, 1942		Fiscal, 1943		Fiscal, 1944	
	7-1-39 to 6-30-40	7-1 to 12-31-40	1-1 to 6-30-41	7-1 to 12-31-41	1-1 to 6-30-42	7-1 to 12-31-42	1-1 to 6-30-43	7-1 to 12-31-43	1-1 to 6-30-44
commitments	\$1.1	8.5	4.2	6.0	17.2	13.8	13.0	12.2	12.0
expenditures ....	.....	0.9	1.7	2.8	6.2	7.6	13.8	12.2	14.9

The commitments represent roughly the amount of contract obligations (including letters of intent) executed; plus amounts for pay, subsistence and transportation of naval personnel (for the fiscal years 1941 to 1944, inclusive, expenditures for these purposes, in billions of dollars, were 0.32, 0.65, 2.01 and 4.8, respectively). It will be noted that *commitments* in the first [72] half of 1942 almost tripled those of the latter half of 1941, and that *expenditures* in the first part of 1942 were more than double those of the earlier period. Furthermore, both

commitments and expenditures for the second half of 1941 had gone up very considerably over those of the first half of 1941.

ii. Number and size of contracts

10. The following figures indicate the vast increase in procurement contracts during the months of the fiscal year 1942 beginning July 1, 1941 up through April 30, 1942. The figures include all new work awarded, consisting of all new contracts, letters of intent and extensions of existing contracts. Letters of intent were the informal (but nonetheless binding) contracts awarded to a manufacturer in order to authorize him to get started on the work in advance of the time when detailed contract terms or prices could be worked out. They were often used when specifications were not completed, when it was necessary to finance the contractor immediately, or when the detailed terms—including often intricate payment provisions and delivery schedules—might take a long time to negotiate.

		(\$1,000,000's)								
		1941						1942		
		July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
Total dollar amount										
of awards		\$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.9
Expenditures					\$450	400	700	600	700	1,100
Total number of										
awards over										
\$50,000		541	473	434	587	604	749	1,083	1,085	1,344

11. The above figures are further broken down by Bureaus as follows:

	(\$1,000,000's)									
	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
<i>contracts</i> (signed										
Secretary—primar-										
facilities, vessels)										
ount.....	\$73.6	40.0	121.8	79.9	4.9	50.0	37.9	6.3	10.1	33.7
er \$50,000.....	32	31	40	26	7	23	21	15	15	38
<i>Ord Contracts</i>										
(BuOrd)										
ount.....	\$12.3	23.7	13.2	11.0	61.5	27.2	58.7	35.9	99.4	138.4
er \$50,000.....	8	9	8	22	36	26	25	27	70	87
<i>NXs Contracts</i>										
(BuSandA)										
ount.....	\$306.3	247.2	372.8	228.7	281.8	724.0	747.7	2,344.4	1,254.5	1,135.5
er \$50,000.....	351	340	318	404	362	477	670	657	735	1,070
<i>Oy Contracts</i>										
(BuY&D)										
ount.....	\$264.4	25.9	55.4	100.3	110.4	101.4	143.4	145.1	184.2	131.5
er \$50,000.....	128	66	80	120	167	180	230	251	380	326
<i>Obs Contracts</i>										
(BuShips)										
ount.....	.....	.....	.....	\$0.9	5.5	119.5	361.7	315.8	628.4	230.8
er \$50,000.....	.....	.....	.....	2	15	26	61	78	96	116
<i>Contracts (Bu-</i>										
<i>—only facilities)</i>										
ount.....	.....	.....	.....	.....	\$21.6	2.9	5.4	71.3	21.0	66.1
er \$50,000.....	.....	.....	.....	.....	11	4	14	20	27	26
<i>Om Contracts</i>										
<i>Marine Corps)</i>										
ount.....	\$6.2	5.4	2.4	2.2	1.6	4.3	18.2	8.7	5.1	9.4
er \$50,000.....	22	27	8	13	6	13	56	37	21	55

Throughout this ten-months' period, the Bureau of Supplies and Accounts executed all contracts for the articles specified by the Bureau of Aeronautics (except facilities) and for a great many of the articles specified by the other Bureaus. In September and October 1941, the Secretary delegated his power to execute negotiated contracts to the Chiefs of the several Bureaus; this fact accounts for the change in distribution of the contracts awarded following such months. [74]

iii. Decline in use of competitive bids

12. The following table shows the predominance of the negotiated contract as compared with contracts let after competitive bids during the period in question:

	(\$1,000,000's)								
	1941						1942		
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
Competitive bids	\$96.9	78.4	88.9	87.5	101.1	121.8	112.1	73.7	67.9
Negotiated contracts in- cluding letters of in- tent and extensions of existing contracts)	\$505.1	250.0	457.1	311.4	362.0	869.2	1,222.6	2,803.2	2,112.6

Under the old competitive bid contract, used prior to the emergency, there was almost no pricing problem—the contract was awarded to the lowest bidder. It is true that a modified system of competitive bids was used in the award of many negotiated contracts: the Department would request several manufacturers to submit, more or less informally, their estimated prices. The manufacturer submitting the low price would, other conditions being equal, receive the bulk of the Department's order for the item to be procured. In many cases, the Department

would negotiate contracts with all of the manufacturers submitting prices; the high bidders would receive contracts for lesser quantities than the low bidders. Under this modified form of bidding, however, there was some negotiation in the arrival at the final contract price, and pricing was much more of a problem than it had been under the earlier system of competitive bidding.

iv. Dollar amount of letters of intent

13. The progressive increase in the use of letters of intent indicates the pressure which was being put upon contracting officers. The following table demonstrates the increasing reliance upon letters of intent: [75]

(\$1,000,000's)										
1941						1942				
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
al contracts										
awarded	\$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.9	1,953.8
ers of intent.....	\$124.9	20.6	80.1	33.0	23.1	249.6	628.8	2,408.6	1,416.5	860.7
vious months' let-										
ers of intent su-										
perseded by con-										
acts executed .....	.....	.....	.....	.....	\$48.2	57.6	26.1	53.7	223.7	297.9

The use of letters of intent in the Bureau of Ships is particularly striking:

Bureau of Ships—Contracts Awarded

(\$1,000,000's)					
	1941, Dec.	Jan.	1942 Feb.	Mar.	Apr.
Total contracts awarded.....	\$119.4	361.7	315.7	628.4	230.8
Letters of intent	\$119.4	361.7	313.5	628.4	225.8
Previous months' letters of intent su-					
perseded by contracts.....	\$0.3	.....	6.1	.....	.....

14. In conclusion, the contract figures for the fiscal year 1942, from July, 1941 until the passage of the renegotiation statute, show (1) a great increase in the amount of matériel contracted for, (2) virtual abandonment of competitive bidding as a method of awarding contracts and (3) an increasing use of the letter of intent.

b. General Factors Making Close Prices Difficult

15. A number of factors complicated the procurement programs at this time. These factors were more or less inevitable with the outbreak of war and the huge spurt in procurement.

i. Lack of experience

16. The enormous increase in procurement tells its own story. The Navy Department had no experience enabling it to cope with the problem of fixing close [76] prices under the new procurement programs. Contractors were being asked to produce items in quantities never before contemplated. Thus, in late 1940 and early 1941, contracts for vessels were let in quantities exceeding those of the first World War, and in early 1942, these quantities were still again increased. A single contract for one ordinance item (5" gun mounts) which had theretofore not been made outside Government gun factories, called for a quantity of such items in excess of the total number previously made in this country in the gun factories. Many other examples could be cited.

17. Contractors were called upon to manufacture new items which had never before been produced—such items as radar equipment, new plane and vessel designs, floating drydocks, and Bofors and Oerlikon guns. Specifications for some items were not completed until the con-

tract was performed; the requirements for other items were changed constantly through the life of the contract.

18. Many contracts were long-term contracts which extended for more than one year. The majority in dollar volume of combatant ship contracts were contracts for twelve months or more. Similarly, most of the contracts for construction of public works and facilities, and for air frames and engines were long-term contracts. The bulk in dollar amount of contracts let for these items in the *fiscal* year 1942, prior to passage of the renegotiation statute, ran until 1942 or 1943. Almost all aircraft and construction contracts were let on a cost-plus-a-fixed-fee basis. Of the contracts for vessels, a larger dollar amount were made on the fixed-price basis, but these fixed-price contracts were made subject to adjustment and escalation in respect of direct labor and material costs. [77]

19. Contracts were awarded to many contractors, particularly in the aircraft industry, in amounts tens and even hundreds of times greater than their capital investments.

ii. Problems in building up procurement personnel and organization

20. For the fiscal year 1940, obligations of Navy appropriated funds totalled approximately 1.1 billion dollars; for the fiscal year 1941, obligations were about 12.7 billion dollars, (note the table in paragraph 9 above). In fiscal 1942 total obligations were 23.2 billion dollars, with obligations in the second half of such fiscal year (i.e., the first half of calendar 1942) amounting to 17.2 billion. The dollar volume of obligations incurred in the first six months of 1942 was comparable to the dollar volume of obligations incurred in the preceding two and one-half

years (2.8 billion dollars less). The great jump in contract obligations which took place in the second half of 1940 was largely due to the great expansion in ship-building authorized in mid-1940, and, to a somewhat lesser extent, to the expansion in plane authorizations and construction of public works and facilities.

21. Within two years, the procurement machinery of the Navy had to be stepped up to the point where it could turn out, in a six-months' period, contracts for munitions for about thirty-one times the dollar amount of the obligations incurred in the first half of 1940 (approximately \$0.55 billion—50% of the \$1.1 billion commitments recorded for the twelve months of fiscal 1940—as compared with \$17.2 billion in the first six months of 1942). The difficulties of turning out the contracts for the widely diversified items procured by the Navy (from battleships to buttons, from planes to pork products) increased rather in a geometric progression as the dollar amount of Navy needs [78] and the number of Navy contracts necessary to fulfill such needs multiplied.

22. The Navy Department started its emergency procurement program in June, 1940, with personnel adequate to handle one billion dollars of procurement per year; it was impossible, within the year and one-half which followed, to build up the personnel who could handle procurement at the rate of 34 billion dollars per year (17.2 billion dollars for the first half of 1942), and at the same time achieve close pricing on the munitions for which contracts were being written. Even if there were in the country enough persons skilled in procurement problems and analysis of costs to undertake to fix close prices on

munitions, such persons would have had no background of experience in the prices of a large proportion (if not most in dollar volume) of the items procured by the Navy. Not only was the Navy Department purchasing many items which had never before been made by the contractors, but it was also purchasing items in such quantities in 1941 and early 1942 that previous price experience was almost useless as a guide.

23. It is most important to recognize that pricing was only one of the factors which had to be considered by the Navy Department in expanding its procurement. The enormous increase in the number of technical personnel—engineers, architects, designers—required to handle the specifications for Naval matériel can be understood readily enough. Another factor too often overlooked is the mechanical problem of getting out completed contracts. The Bureaus, which prepared all of the contracts, had to set up entirely new contract organizations. The coordination of procurement by the Bureaus became increasingly difficult—what had been relatively simple when procurement was at the rate of one billion dollars a [79] year became extremely complex when procurement jumped twelve-fold, and then twenty-three fold. Many different efforts at coordination were made; the agencies most responsible for unifying contract policies—the Procurement Legal Division of the Under Secretary's Office and the Office of Procurement and Material of the Secretary's Office—were not established until July, 1941 and January, 1942, respectively. Organizations to assist contractors—in obtaining priorities, solving labor problems, building facilities, securing capital—all had to be established and manned, and it took time for such organizations to acquire

the necessary know-how. Other organizations were required to coordinate Navy procurement policies and procedures with the policies and procedures of other Government agencies, to prevent the competition for contractors which helped to demoralize the early procurement of World War I.

24. The Navy Department had made a fair beginning towards solving these many problems at the time war was declared. The declaration of war, however, at the same time rendered imperative the immediate functioning of all of the agencies necessary to handle the procurement problems, and also made the problems much more acute. Through all of the process of organization for wartime procurement, the contracts had to be turned out, and in far vaster quantities than theretofore. One partial solution, of course, was the issuance of letters of intent rather than the more formal contracts, which could be worked out thereafter. The figures which I have cited earlier indicate the extent to which this device was used in the period under consideration. The use of letters of intent, however, merely postponed the day when the more formal contract was to be written; and at several times the backlog of letters of intent became peri- [80] lously large, and the problem of pricing still remained when letters of intent were used. The Department did issue some letters of intent under which prices were fixed, but as a general rule, the letters of intent were silent as to prices, with the understanding that prices would be set later in the definitive contract.

25. The Navy Department was struggling, throughout the year and one-half prior to passage of the renegotiation statute, to obtain personnel to get out the specifications,

to write the contracts, and to aid in the production, of the material required. Indeed, we have not today completely solved this problem—we still have need of experienced personnel who can take over the constantly changing procurement problems.

iii. Uncertainties as to costs

26. Added to the absolute lack of experience as to the cost of many items and the difficulties inherent in training personnel to meet new problems of theretofore unrivalled magnitude, were the many uncertainties as to certain costs—in 1941 and 1942 the scarcity of materials and of manpower, and rising prices and wages, made particularly difficult the forecasting of costs.

27. The problem of material shortages became acute in early 1942. The predecessor to the War Production Board had been established to administer the priorities authorized by the "Navy Speed-Up Act" of June 28, 1940. The Army and Navy Munitions Board had been working with the War Production Board and its predecessors for the one and three-quarter years prior to April, 1942, in enforcing a system of priorities in metals for Government contracts. In the first half of 1942 the armed services and the War Production Board were engaged in working out a system of control much stricter than that theretofore in [81] effect—the Production Requirements Plan, which was put into effect on July 1, 1942. The application of all of the priority ratings was an immensely complicated job, which was administered in the Navy Department by the Production Branch of the Office of Procurement and Material. In addition to the metals covered by the priority schedules, there were several other

raw materials which were at this time extremely critical because of shipping losses and other factors.

28. At this same time also, manpower shortages were beginning to be felt as the draft was stepped up enormously, although the shortage in manpower became most critical some months later.

29. The armed services had experienced some labor and wage troubles at the plants of contractors. The most acute cases were, of course, those of North American Aviation, Inc., which was taken over by the War Department under Executive Order No. 8773 dated June 9, 1941, and Federal Shipbuilding & Dry Dock Co., which was taken over by the Navy Department under Executive Order No. 8868, dated August 23, 1941. Wages were rising, from early 1941 onward. In mid-1941, the Navy took the initiative in having the nation's shipbuilders enter into zone agreements with respect to labor. These agreements, while they helped to insure a supply of labor, had the undoubted effect of raising labor costs at most shipyards, including those not covered by the agreements, which tended to raise wages for all shipyard workers. There was also established a shipbuilding stabilization program reimbursement policy, to which the Navy Department, War Department and Maritime Commission adhered; the three agencies have from time to time issued administrative instructions governing reimbursement to shipbuilders of specific labor costs. Zone agreements. Zone agreements somewhat similar to those in the [82] shipbuilding industry were likewise established for the construction and building-trades industries.

30. Wages continued to rise throughout late 1941 and the first part of 1942, and the trend was not effectively

checked until after the President's "hold-the-line" Executive Order 9250 (promulgated upon passage of the Second Emergency Price Control Act of 1942 on October 2, 1942) which empowered the President to establish wage ceilings. Overtime charges began to mount in late 1941. As the War and Navy Departments demanded speeded-up production and extra shifts, they promised fixed-price contractors, who had not contemplated substantial overtime wages at the time their contracts were let, that the contract prices would be adjusted in the light of the overtime payments.

31. Scarcity of materials and growing scarcity of manpower made for higher costs to contractors. From the very inception of the national defense program, contractors were fearful of price rises which might wipe out not only their profits under long-term contracts, but also their entire companies. They were therefore insistent upon protection by the Government against such price rises. From the latter part of 1940 on, escalator clauses were demanded with increasing frequency under fixed-price contracts. In 1941 and early 1942. I should judge that the great majority in dollar amount of fixed-price contracts provided escalation in some form or another. Many contractors faced with the production uncertainties which I have outlined above, in addition to price increases, insisted upon cost-plus-a-fixed-fee contracts to protect themselves.

32. Increases in production and in efficiency were so swift that in many cases the increased costs which had been anticipated and were to be covered by escalation [83] were completely swallowed up in the greater than anticipated profits earned by contractors. It had been,

and still is, generally impossible to forecast accurately the effects upon costs, of increased volume or of the productive efficiency of Navy contractors. In addition to this fact that contingent costs (against which escalation was provided) were offset by unanticipated profits, the fixed price under any contract containing an escalator clause invariably also contained allowances for many contingencies not covered by escalation. Escalator clauses did not provide complete protection against fluctuation in costs; there were at the time many uncertainties as to overhead costs against which the contractor claimed to have no protection except amounts for contingencies included in his contract price. In practice, price escalation worked only upwards, although the escalator clause generally did provide for revision downwards of prices based on direct labor and material costs, as well as for revision upwards thereof. The cost-plus-a-fixed-fee contract was virtually a riskless contract. As the production of so many contractors increased many times over, the return in profits under fees fixed upon the volume of their business amounted to vastly more on their capitalization than had profits prior to the emergency and war periods.

33. Manufacturers demanded protection against the uncertainties facing them; the Navy Department, which had no means of forecasting costs, of necessity had to provide the protection in its contracts in order to obtain the munitions. In general, Navy contractors in 1941 and early 1942 were including in their fixed-price or estimated cost (under cost-plus-a-fixed-fee contracts) allowances for almost all contingencies which could conceivably happen. Almost never did more than a portion of such contingencies happen with respect to a single contractor. In addi-

tion, pro- [84] duction techniques improved so much more rapidly than expected with respect to a great many items that actual costs in quantity procurement were far lower than those which might reasonably have been expected.

iv. Navy contracting and pricing personnel

34. As the statistics earlier cited make clear, most of the increased procurement from mid-1940 to April 1942 (and to date) has been accomplished under negotiated contracts. A very substantial proportion of these contracts were cost-plus-a-fixed-fee contracts, including almost all construction contracts and plane contracts; all facilities contracts provided for reimbursement of costs to the contractor. With respect to the fixed-price negotiated contracts, it was necessary to negotiate prices with the contractors on the basis of estimated costs. The cost of performance was to the extent possible based upon past experience, but past costs were generally stepped up by the inclusion of allowances covering the many uncertainties facing the contractor. The contractor would not undertake the work without adequate protection—and the Navy Department had no valid argument, in the light of the uncertainties as to costs facing the contractor, for rejecting allowances for the protection of the contractor. There was always the possibility, of course, that not all of the contingencies against which protection was being provided in the price would occur, but no one in the Navy Department or anywhere else was able to forecast what contingencies would occur and what ones would not. It is true that many of the fixed-price contracts provided escalation for certain costs, but the inclusion of escalation was necessary in such cases to provide the further cushion

without which the contractor would not undertake to risk the hazards inherent in a fixed price. [85]

35. Prices under contracts awarded after competitive bids were of little aid in determining prices for similar items under negotiated fixed-price contracts. Bidders for Navy contracts submitted bids on the basis of comparative prices and of what they anticipated would be the lowest price, rather than on any very close analysis of costs. In any event, the quantities specified in these earlier contracts and the conditions under which they were let did not afford any precedent for pricing in the later period. With the advent of the negotiated contract, more and more of the nation's industrial capacity was converted to Government work. Competitive forces ceased to have any bearing upon prices—in practical effect, all contracts let were based upon crude estimates of costs, however faulty the early estimates might be, plus an additum for contingencies and profit. As the House Naval Affairs Committee discovered, prices under negotiated contracts were generally lower than prices for comparable items under contracts let to the lowest bidder.

36. At the beginning of the emergency period (June, 1940), the outlook of the Bureaus relative to prices was slanted almost entirely towards purchasing on the competitive bid basis. The Bureau of Supplies and Accounts continued to award some contracts during this period of early 1942 on the basis of competitive bids. Several of the Bureaus had personnel who dealt with comparative prices, based on past experience; such personnel sought to work out prices with contractors. The Bureau of Supplies and Accounts, which had been purchasing standard items in quantity for years, did have some comparative data on

prices, based on the competitive bid awards. But, as procurement vaulted to quantities many more times the quantities purchased before the war, this data became increasingly obsolete. [86] It was true that the Stock, Schedule and Statistical Sections of the Bureau kept records of past purchases and that such records would be of value in ascertaining the propriety of a negotiated fixed-price. The other Bureaus had only a handful of personnel engaged in drafting of contracts and pricing thereunder, and began in the latter part of 1940 to build up their contract divisions.

37. The new contracting personnel necessary to handle the increased volume of procurement, gradually gained experience with pricing; their training took time. At the start of the emergency procurement, there was on hand inadequate data as to contractors' costs, and consideration of prices offered by contractors was based largely on comparison with prices paid by the Navy for similar munitions in the past, usually under very different conditions. Past experience naturally offered little guide in the determination of prices to be paid for articles which had never been built before, as we discovered in the cases of destroyer-escorts and anti-aircraft guns, for example.

38. As of April 28, 1942 the Navy Department did not have any working organization whose primary responsibilities were analysis of prices and advice in the negotiation of accurate prices which when compared with costs would not allow undue profits. The Cost Analysis Section and the Price Adjustment Board had just been established in the Office of Procurement and Material (itself organized on January 30, 1942) attached to the Secretary's Office, and had had little opportunity to ac-

comply with anything in the way of recommending price reductions. There was no agency—and would not be until July or August, 1942, when the Price Negotiation Branch of Supplies and Accounts was set up—which was in negotiating a [87] procurement deal solely responsible for checking into the contractor's probable costs and for seeking to determine whether the prices submitted should be reduced. A lot of thought had gone into the matter of high prices and excessive profits, and we were slowly moving toward corrective measures which proved to be effective. It is true that before the war, almost half in dollar amount of negotiated contracts were let on a cost-plus-a-fixed-fee basis, or on a cost basis in the case of facilities, and a substantial portion of contracts were still being made to the lowest bidder after solicitation of competitive bids. Past experience was of little assistance in the latter case. Most of the large profits earned by Navy contractors were due to increased volume or ability of the contractor, making a new article with which he was unfamiliar, to reduce his costs promptly, and to allowances for contingencies which did not arise. The Navy Department did not have the pricing experience at this time to deal adequately with these factors. Again I want to point out quite frankly that the Department was primarily interested in getting the munitions as promptly as possible. In the haste to acquire the matériel of war, it had also to expand and develop its procurement organization. The Navy Department had at the time neither the knowledge nor the experienced personnel necessary to achieve close pricing—and indeed, during wartime, it may be doubted whether anything but limited success in negotiating prices to reflect costs be achieved.

c. Specific Contract Prices During This Period (July, 1941-April, 1942)

39. Naturally, as contractors gained experience, and as the Navy became better able to analyze costs, it has [88] been possible to negotiate lower prices on a great many items. I have listed some of the factors which made for high prices and high profits. I submit some actual examples of prices under contracts let during this period and subsequent reductions of these prices.

i. Bureau of Ships

40. The Bureau of Ships was responsible in 1941 and 1942 for the expenditure of a larger dollar volume of appropriations than was any other Bureau (although the Bureau of Supplies and Accounts in the months prior to passage of the renegotiation statute was writing a larger dollar volume of contracts, because of the large number of contracts such Bureau wrote upon requisition from the other Bureaus). The value of ships completed and converted under Navy contracts rose from about \$142,146,000 in the second half of 1940, to \$720,494,000 in the first half of 1942, to \$3,590,509,000 in the first half of 1944. For the fiscal year 1941 (July 1, 1940-June 30, 1941), *expenditures* by the Bureau of Ships totaled \$912,000,000, as compared with \$3,074,000,000 for the next fiscal year, and \$9,384,000,000 for the fiscal year 1944 (June, 1944, estimated).

41. The contracts necessary to fulfill the 11% and 70% expansions of the Navy (authorized by the Congress in June and July, 1940) were largely awarded by the end of the first quarter of 1941. In general, these contracts, which each specified the delivery of a number of combatant

ships, were not completed until the latter part of 1942 and 1943. On the average, the following lengths of time are required to complete the several combatant ships:

Battleships.....	32 to 35 months.
Aircraft carriers.....	17 to 21 months. (The escort carriers require about 11 months.

[89]

Cruisers.....	22 to 25 months.
Destroyers.....	7 to 13 months.
Destroyer Escorts.....	7 months.
Submarines.....	11 months.

42. I have had compiled data on some 13 contracts executed between July 1940 and February, 1941, covering combatant ships. These contracts, all of which were made on a fixed-price basis, subject to adjustment according to changes in direct labor and material costs, provided a total of \$750,097,400 (before adjustment) of contract prices. None of these contracts was completed until late 1942 or 1943. They were completed at a total cost to the contractors of \$514,720,566. The total profit under the contracts, disregarding adjustments and disregarding renegotiation and voluntary refunds, would therefore have amounted to \$235,376,834, or 45.7% of the cost of performance. The cost of performance included increases in labor and material prices during the lives of the contracts, whereas the contract prices as above stated have not been adjusted upward in accordance with escalator adjustments to which the contractors would have been entitled under their contracts. Since the basic month for escalator purposes was between July, 1940 and February, 1941, and the expenditures were incurred from one to two years later, sharp upward adjustments would have been required if esca-

tion had been computed—it is estimated that such adjustments would have amounted to 10 to 15% of the cost in the case of destroyers, and 15 to 20% of the cost in the case of the larger vessels. As examples of the discrepancies between original unit contract prices and unit costs to the contractor under these contracts, I cite the following: [90]

	Number of Ships	Original Unit Price	Average Unit Cost	Difference as Percentage of Costs
Destroyer Program				
1st contract	6	\$7,159,700	\$5,445,225	31.5
2nd contract	6	6,813,200	4,560,074	49.5
3rd contract	8	5,379,000	4,705,896	14.3
4th contract	5	7,360,000	4,900,245	50.2
5th contract	17	6,813,000	4,425,605	53.9
6th contract	6	5,977,000	4,241,268	40.9
7th contract	4	5,579,000	4,620,142	20.8
Carrier Program				
1st contract	2	43,662,000	26,625,000	64.0
2nd contract	1	42,725,000	26,500,000	70.6
3rd contract	3	46,125,000	26,600,000	73.4
Cruiser Program				
	2	19,272,500	14,725,000	30.9
Submarine Program				
1st contract	13	2,795,000	2,246,761	24.4
2nd contract	25	2,765,000	2,246,761	23.1

At the time of the award of the above contracts, there was an informal understanding between the Bureau of Ships and the contractors that if actual costs proved to be out of line with the prices fixed, some adjustments would be made. In practice, since none of these contracts was completed until after the passage of the renegotiation statute, all were renegotiated under the statute.

43. Both the destroyer-escort program and the landing-craft program were launched in force in early 1942, although the great majority of contracts for these vessels were not executed until after passage of the renegotiation statute. In neither case had the contractors or the Navy Department had any experience [91] with building these new types of vessels, and original costs were naturally high, because specifications were constantly changing on the early vessels. No contracts for destroyer-escorts were made prior to passage of the renegotiation statute. Work had been begun, however, on several of the vessels, and general agreement on an estimated cost of \$3,300,000 per vessel was reached in the first part of 1942. All of the contracts for these ships except one was made on a cost-plus-a-fixed-fee basis, and the resulting actual costs of the ships indicate the difficulty of arriving at a fair estimate for an item which has never been made before. Actual costs under eight contracts varied from \$1,440,198 per vessel to \$2,667,583 per vessel (the next highest being \$2,348,578). The total fees fixed on the eight contracts amounted to 11.87% of the actual cost. Under the single fixed-price contract, which provided a unit price of \$3,500,000, actual unit costs amounted to \$1,809,644, or a profit without renegotiation of 93.4%. As I have earlier indicated, the contractor who took work on a fixed-price basis was entitled to cushions for the many contingencies which might arise and wipe out his profits. There was a definite agreement with respect to the destroyer-escort contracts that as costs were more accurately determined, prices and estimated costs would be adjusted accordingly. The Navy Department was in no position to insist upon the elimination of cushions from the price of a ship which

had never before been built, with all of the uncertainties as to costs facing the contractor.

44. With respect to propulsion machinery, I shall repeat an example which was submitted by Secretary Knox to the Congress in April, 1942.¹ Secretary Knox said: [92]

For example, one of our suppliers with whom we had a contract for 200 destroyer turbines produced the first turbine on our designs at a cost of \$2,559,000, which was very substantially above what that company's engineers had estimated the cost would be. After the production of 15 turbines, through economies of operation and increased efficiency, this cost was reduced to \$607,000 per turbine. It is now estimated by the company that it will not be until after completion of the seventy-second turbine that the cost will drop to the figure estimated in quoting to the Navy the contract price of \$300,000 per turbine. This latter cost the company believes will be stable.

ii. Bureau of Ordnance

45. During this period in question, a very large amount of ordnance items were procured under contracts made by the Bureau of Supplies and Accounts. *Expenditures* by the Bureau of Ordnance increased from \$377,000,000 for the fiscal year 1941, to \$1,915,000,000 for the next fiscal year and \$3,634,000,000 for the fiscal year 1944.

46. Typical of the increases in volume of ordnance procurement is the jump in production under Navy con-

¹Hearings before the House Naval Affairs Committee on H. R. 6790, 77th Cong., 2d Sess., April 16, 1942, page 2922.

tracts of one antiaircraft gun from approximately 1,000 in the last half of 1941 to about 10,500 in the first half of 1942; another gun jumped from 300 to 1,000 over the same two periods (top production of this item was reached in the second half of 1943 with 3,800 production). Production of Navy ammunition multiplied many times over in 1942.

47. The progressive reductions in prices of two types of antiaircraft guns which had not prior to the present emergency been manufactured in this country is most striking. These guns have been manufactured [93] for the most part by former automobile manufacturers, who had previously had no prior experience in their production. The Oerlikon gun (20 mm.) with one type of mount was manufactured under one contract made September 9, 1941 for a price of \$7,531.42 per gun; under a contract dated January 20, 1943 with another manufacturer, its price had been reduced to \$4,519.97, with a still different type of mount, a contract for the Oerlikon guns dated September 22, 1942 specified a unit price of \$6,330; the later contract with the same manufacturer dated May 5, 1944 had brought the price down to \$3,666. This same type of gun was made without mounts under a contract dated June 8, 1942, fixing a unit price of \$4,958.50; the present contract with the same manufacturer dated May 5, 1944 specifies unit prices ranging from \$2,133 down to \$1,708 as production increases.

48. The Bofors gun (40 mm.) prices show equally astonishing decreases. The original contract dated January 7, 1942 specified a unit price of \$4,288 (without mounts); the later contract with this manufacturer dated November 11, 1943 brought the price down to \$2,510.

49. Prices of 20 mm. and 40 mm. projectiles have come down to about 50% of the original prices. These items are items as to which the changes in specifications have not presented the problem present with respect to many naval munitions. Quantities produced under Navy contracts have multiplied many times over during the past three years, and the price reductions may be attributed in large part to increases in volume. Production of the 20 mm. shells was begun in June, 1941 under eight contracts specifying unit prices which varied between 21.5¢ and 25.23¢ per shell; the most recent contracts in January and May of 1944 specify prices from 11.2¢ to 14.46¢ per shell. Simi- [94] larly, production of 40 mm. projectiles began in June and July, 1941 under eight contracts with prices ranging from 64¢ to 84¢ per unit; the latest contracts, executed in August and November, 1943 and September, 1944, provide payment of between 43¢ and 50¢ per shell.

50. Prices of other ordnance items have indicated how difficult it is to arrive at a price under the original contracts. One model of gunsight has dropped from \$2,638.29 to \$1,571.19. A case for depth charges which originally cost the Government \$15.07 was later reduced to \$10.31. Three-inch gun-barrel forgings were priced at \$1,580 under the original contract of May 5, 1941; under the contract dated November 21, 1942, the price had gone down to \$1,000.

iii. Bureau of Supplies and Accounts

51. This Bureau purchases all of the standard supplies, hardware, clothing, subsistence items, and the like. The Bureau both prepares the specifications and writes

the contracts for most standard supply items—hand tools, repair materials, furniture, stock items and the like. In 1941 and 1942 the Bureau of Supplies and Accounts also wrote a great many contracts for the other Bureaus, which drew up the specifications for the items to be procured, negotiated the price, and then sent a “requisition” covering the procurement to the Bureau of Supplies and Accounts to be written up in contract form.

52. Total *expenditures* of the Bureau (for items as to which it both prepared the specifications and wrote the contracts) increased from \$563,000,000 in fiscal 1941 to \$1,409,000,000 in fiscal 1942 and to \$6,127,000,000 in fiscal 1944. These figures include expenditure of very substantial amounts for pay, subsistence and transportation of naval personnel. A very large [95] proportion in dollar amount of the Bureau’s total procurement consists of petroleum products.

53. The prices under Navy contracts of most of the subsistence items and clothing items are so closely related to material costs that volume procurement does not have any appreciable effect upon the prices. I do not therefore present any examples of purchases of either subsistence or clothing items.

54. I shall cite several examples of reductions in the prices of some standard stock items largely as a result of purchasing in large quantities. Thus, twist drills are purchased under contracts for hundreds of thousands of dollars; the unit prices for these drills in different sizes and specifications vary from 8 or 10¢ to several dollars. Prices under a 1944 contract with one manufacturer for assorted lots of drills were 22½% less than prices under a 1942 contract with the same manufacturer. Another

item of hand tools—hand taps—are purchased in a very wide variety of sizes and prices. Prices under a 1944 contract for hand taps show a decrease of 20% under the prices specified in a 1942 contract with the same manufacturer.

55. Comparison of prices for sisal rope of a certain specification under two contracts with the same manufacturer shows the following unit prices:

Size of rope	Price per pound	
	1942 contract	1944 contract
¾".....	\$0.195	\$0.1835
1⅛".....	.19	.1763
1½".....	.1825	.1619
4½".....	.175	.1547
8".....	.175	.1547

The differences per pound are in cents and fractions of cents; but as the contracts involve several [96] hundreds of thousands of pounds of rope, these differences become quite large in total.

56. The difference is even more substantial in the case of steel cable. One of the early contracts, made in 1941, specified a price for certain ⅛" steel tow cable of \$0.051 per foot; the contract for the same type of cable with the same manufacturer in 1944 provided a price of \$0.037 per foot—a decrease of \$0.014 per foot, or 28%. The later contract required delivery of 30,000,000 feet of cable, so that the total decrease from the original price amounted to \$580,000.

57. Paint brushes under two contracts about 10 months apart (both executed in 1944) with the same manu-

facturer decreased from \$2.95 to \$2.61 for one size, from \$2.67 to \$2.34 for another; again, the difference is substantial under a contract for 105,578 brushes.

58. Perhaps a comparison of prices of nuts and bolts under a 1943 contract and a 1944 contract will bring home as cogently as any other comparison the difficulty of close pricing on small standard items. Under the earlier contract, the price for one $\frac{1}{2}$ " by 5" bolt and nut was \$2.86 per hundred, while the price under the later contract was \$2.12 per hundred; the prices for a $\frac{3}{4}$ " by 6" bolt and nut were \$7.51 per hundred as compared with \$5.30 per hundred. Even more striking is the difference between the prices for a 1" by 5" bolt and nut—\$14.90 per hundred under the first contract, and \$10.10 under the second.

iv. Bureau of Aeronautics

59. All contracts for aircraft and aircraft components during 1941 and 1942 were drafted and executed by the Bureau of Supplies and Accounts, although prices and terms under these contracts were negotiated by the Bureau of Aeronautics. *Expenditure* of appro- [97] priations for which the Bureau of Aeronautics was responsible increased from \$194,000,000 in fiscal 1941 to \$1,052,000,000 in the next fiscal year, and \$4,696,000,000 in fiscal 1944. Total aircraft accepted (reflecting earlier contracts made) increased 122% from the first half of 1941 to the second half of 1941; acceptances in the first half of 1942 were 210% of acceptances in the preceding six months; and the second half of 1942 saw acceptances more than 200% of those for the first half of that year.

60. The contracts for airframes during this period were, with one exception, all cost-plus-a-fixed-fee contracts. They were invariably long-term contracts, in general extending over 18 months or more. The airframe manufacturers required cost-plus-a-fixed-fee contracts at this time, for their margin of capital in relation to total business was so small that they could not afford to incur any risks. For example, the Grumman Company had a capital of \$5,000,000, yet its contracts with the Navy approximated half a billion dollars.

61. In the contracts for both airframes and engines, innumerable changes in specifications are made during the life of the contract.

62. One cost-plus-a-fixed-fee contract for torpedo bomber frames was let on March 23, 1942, at an estimated unit cost (plus fee) per plane of \$101,863. This same contract was later converted into a fixed-price contract providing for incentive payments as reductions were made below specified costs, and as of September 30, 1944, the unit redetermined price was \$58,050. A cost-plus-a-fixed-fee contract for scout bomber frames was made on February 2, 1942, at an estimated unit cost (plus fee) of \$34,019 per plane; the present contract for the same frames is on the basis of \$30,160 estimated unit cost. Finally, a con- [98] tract made May 23, 1942, on a cost-plus-a-fixed-fee basis provides an estimated unit cost of \$63,985 for fighter frames; the most recent contract for these frames (fixed-price adjusted contract) calls for a unit price of \$39,000.

63. Similar decreases are evident in the procurement of engines and propellers. Prices under 1941 and 1942 contracts for three different types of engines and two types

of propellers, and prices under more recent contracts for the same articles may be compared as follows:

			Old Contract			Latest Contract		
			Date	No.	Unit Price	Date	No.	Unit Price
1st	Type	Engine.....	9/10/41	204	\$14,500	12/29/43	439	\$11,200
2nd	Type	Engine.....	7/29/41	2,293	13,151	12/29/43	400	11,051
3rd	Type	Engine.....	7/14/41	80	6,522	12/29/43	1,400	5,848
1st	Type	Propeller.....	4/ 4/42	259	1,081	12/23/43	583	878
2nd	Type	Propeller.....	3/30/42	248	2,266	12/29/43	3,375	1,880

64. The procurement of aircraft components likewise shows striking reductions in contract prices as the items are produced in greater quantities and as mechanical problems are surmounted. The following table shows the reductions in prices which have been effected for some items:

		Old Contract		Latest Contract	
		Date	Unit Price	Date	Unit Price
Motor	Alternator	4/27/42	\$280.00	5/15/44	\$173.00
Starter—1st	type	3/ 1/42	370.00	3/ 4/43	333.00
Starter—2nd	type	2/ 2/42	355.00	12/ 2/43	290.00
Generator	.....	9/11/41	343.00	7/11/44	229.00
Navigational	Watch	5/28/41	30.25	3/23/44	28.45
Oil Pressure	Gauge.....	10/16/41	2.35	11/10/43	1.95
Compass	.....	8/22/40	43.50	4/13/44	35.72

v. Bureau of Yards and Docks

65. The expenditures of the Bureau of Yards and Docks increased from \$412,000,000 in the fiscal year [99] 1941 to \$1,076,000,000 in the fiscal year 1942, and \$2,-265,000,000 in fiscal 1943. The Bureau's work reached its peak in the second half of 1942, when some \$1,768,-625,000 of work was reported completed on projects under

the supervision of the Bureau of Yards and Docks. The great bulk of this work was done under contracts which had been made prior to passage of the renegotiation statute—indeed, many of them were made in 1939, 1940 and 1941, when some of the large contracts for base projects and advance bases had been let. The Bureau of Yards and Docks supervises construction of industrial facilities under the facilities contracts made by the other Bureaus.

66. The peak in the making of construction contracts and the peak of construction thereunder was reached in 1942. Commitments for all types of facilities (industrial and non-industrial) for the first half of 1942 totaled \$2,742,100,000, for the second half of 1942, \$1,420,400,000; expenditures for work completed in these two six-months' periods were \$1,275,000,000 and \$2,190,000,000, respectively. The bulk of facilities contracts executed in the last six months of 1941 and the first four months of 1942 extended beyond the date of passage of the renegotiation statute on April 28, 1942.

67. It has been estimated that roughly 80% in dollar volume of construction contracts and extensions thereof made by the Bureau of Yards and Docks in fiscal 1942 required over 8 months to perform. Most of the very large construction contracts for construction of new bases extend over more than 12 months. It is of course impossible to compare costs or prices of different construction jobs, although prices of construction materials may be compared.

68. As to items procured by the Bureau of Yards and Docks, I shall cite as examples two items—pon- [100] toons and floating dry docks. The pontoon program was started near the end of 1941 with an order for a few

thousand pontoons; the number contracted for multiplied over six times in 1942, and increased in 1943 far beyond what anyone had anticipated. The Bureau procures two major types of pontoons, one of which is procured in numbers about 9 times as large as the other type. Prices have come down as follows:

	1st type	2nd type (procured in the larger quantities)
1941 (includes development costs)	\$400	\$660
1942	335	370
Late 1942 .....	.....	250
1944	270	200

Construction of floating dry docks began in 1941. These were an entirely new item, and extensive changes in specifications and designs were made during the life of the early contracts. All of these contracts extended beyond April 28, 1942.

II. ACTION BY THE NAVY DEPARTMENT WITH RESPECT TO EXCESSIVE PROFITS

69. The Navy Department in 1941 and the early part of 1942 had only begun to build up machinery for the purpose of ascertaining and recapturing excessive profits under its contracts. I have pointed out the enormous increase in the number of contracts and in the volume of Navy procurement during this period, and the impossibility of acquiring experienced personnel forthwith, to negotiate the best possible prices for the Government. During the period in question [101] (the latter part of 1941 and the first four months of 1942), the Navy Department

discovered that some of its contractors were earning very large profits. We endeavored to correct the situations which came to our attention. It proved impossible then to achieve close initial pricing under most Navy contracts. After our experience of the last several years I am convinced that it will always be impossible in wartime to arrive at close prices for munitions, when the Government is uncertain as to the types of quantities of munitions which are needed (and the exigencies of war are such that we are almost never certain as to types and quantities).

a. 1941 Investigations

70. In the first half of 1941, both the House Naval Affairs Investigating Committee and the Truman Committee sent out questionnaires relative to profits to manufacturers and shipbuilders holding Navy contracts. The Truman Committee in June 1941, conducted hearings upon costs and profits under ship contracts and contracts for ship repair and alteration. These investigations brought out the fact that very large profits were being enjoyed by some contractors; the Truman Committee was particularly concerned with profits under ship repair and alteration contracts. Before these Committees had published any reports, however, the Navy Department made efforts to correct some of the contract prices, particularly under the ship-repair contracts. The first step was to make sure that the Bureau of Internal Revenue would treat a voluntary refund by a contractor as a reduction in his contract price and in his taxable income; in response to inquiries by the Navy Department, the Treasury Department in September 1941 indicated that for tax purposes

it would so regard such a refund, provided the original contract was modified in writing to indicate [102] the reduced price. Thereafter the Treasury further indicated that a refund made after completion of performance of the contract would likewise be regarded for tax purposes as a reduction of gross income.

71. Mr. Forrestal (then Under Secretary) and Rear Admiral Samuel M. Robinson (then Chief of the Bureau of Ships) in September of 1941 requested the Compensation Board to investigate the cost records of contractors who were to complete ships under Navy contracts in 1941 and the first six months of 1942, and to determine what the probable profits in the construction of those ships would be. The Compensation Board was an administrative agency which had been set up by the Secretary of the Navy in the first World War to review costs under cost-plus contracts, and to advise the Secretary generally on amounts claimed by contractors under Navy contracts. Its functions in reviewing costs under contracts had been taken over largely in late 1941 by the Cost Inspection Service of the Bureau of Supplies and Accounts (the Cost Inspection Service was given complete responsibility to inspect costs under cost-plus-a-fixed-fee contracts, except those made by the Bureau of Yards and Docks, by a directive of the Secretary dated February 9, 1942). The Compensation Board planned to have its accounting branch, the Cost Inspection Board, go over the cost records of contractors under outstanding vessel contracts and attempt to estimate what the profits would be under such contracts. It was anticipated that in cases where the profits appeared to be excessive, the Bureau of Ships, acting in conjunction with the Compensation Board, would en-

deavor to persuade the contractors voluntarily to reduce prices. The Bureau of Ships had estimated that by limiting the investigation to contracts for vessels to be de- [103] livered prior to July 1, 1942, performance would be close enough to completion so that a fairly accurate estimate of anticipated profits could be made. Both the Compensation Board and contracting representatives of the Bureau of Ships felt that it would be wise to persuade contractors in advance to modify their contracts to allow readjustment in prices to eliminate excessive profits, if possible—a forerunner of the renegotiation clause.

72. The Compensation Board was unable to carry this project to completion. It did begin investigation of costs under the ship contracts, but the outbreak of war and the transfer of the bulk of its cost inspection activities to the Bureau of Supplies and Accounts cut short the study of excessive profits of naval shipbuilders. The Bureau of Ships, aided by the Cost Inspection Division of the Bureau of Supplies and Accounts, late in 1941 began to carry forward certain of the work projected by the Compensation Board, in that it commenced negotiations with a number of shipyards under the ship repair and alteration contracts for revision of the contract billing rates.

73. At this same time, the House Naval Affairs Committee, acting as a Special Committee to investigate the national defense program, pursuant to House Resolution 162, approved April 2, 1941, was undertaking its study of excessive profits under Navy contracts. The Naval Affairs Committee had in April, May and June, 1941, obtained a list of all contractors with the Navy Department, and it sent out to these contractors a general questionnaire, which required the submission of extensive and

explicit information on costs of performance of Navy contracts and profits thereunder. As responses were received from the contractors, supplemental questionnaires drawn to [104] elicit information as to a particular industry, were issued to contractors in different industries. The Committee stated that it had in the second and third quarters of 1941 sent questionnaires to 6,899 contractors holding 16,463 contracts. The questionnaires, which required a considerable amount of effort to fill out, aroused a good deal of protest, and also increased interest in excessive profits on the part of both the contractors and the Navy Department. (These questionnaires and the responses thereto are summarized in the Committee's report issued January 22, 1942, H. Rept. No. 1634, 77th Cong., 2d Sess.)

74. By October of 1941 Representative Vinson, Chairman of the House Naval Affairs Committee, felt that the Committee had acquired sufficient data on profits of Navy contractors to indicate the need for corrective legislation. While he indicated to the Navy Department that the questionnaires returned to the Committee showed that most of its contractors were realizing only a fair profit, he stated further that profits under certain contracts represented an "unconscionable percentage" of the contract price. Therefore, on October 7, 1941, he introduced H. R. 5787 (87 Cong. Rec. 7713) to provide for the recapture of all profits under Government contracts in excess of 7% of the cost of performance thereof. At about this same time, another bill (H. R. 5739) was introduced imposing a flat percentage limitation of profits under war contracts

—in this bill 8% of the contract cost. The Navy Department was opposed at this time and later to the revival of any percentage limitation of profits, such as that contained in the Vinson-Trammell Act. It has had the experience under the Vinson-Trammell Act with such a type of profit limitation, and the officials responsible for procurement in the Department were confident that any reen- [105] actment of such a limitation would impede the procurement programs.

75. Some consideration was given within the Department in the last several months of 1941 to the best method of limiting profits by administrative action. The only concrete results of this consideration were the readjustments effected by the Bureau of Ships in payments under the ship repair and alteration contracts. These contracts were in effect requirement contracts—i.e., the contractor agreed to perform, for compensation based upon reimbursement of cost of materials and a fixed price per man-hour of work, all orders for ship repair or alteration work which might be placed with him by the Navy Department. Around the 1st of December 1941, the Bureau of Ships began to seek voluntary reductions in rates from the shipyards. Between December 1, 1941, and April 1, 1942, the Bureau in effect renegotiated 27 ship repair and alteration contracts, representing a very substantial portion of the outstanding number of such contracts. At hearings before the Senate Naval Affairs Committee on profit limitations late in January and early in February of 1942, Captain Claud A. Jones (Assistant Chief of the Bureau of Ships) indicated that the Navy had recovered about \$2,000,000 in profits by renegotiation of the ship repair

and alteration contracts.² This figure does not, of course, indicate the savings which would accrue in the future by reason of the renegotiation of such contracts.

76. The work of renegotiating the prices under these contracts was spurred by publication on January 15, 1942, of the Truman Committee's report, which covered among other things profits under Navy contracts for shipbuilding and ship repair and alteration. On [106] January 22, 1942, the House Naval Affairs Investigating Committee issued its first report on the defense program, which dealt extensively (409 pages including appendices) with the matter of profits under Navy contracts.³ While the Committee noted that average profits under the contracts let by the several Navy Bureaus were not too much out of line, it did indicate some examples of extremely high profits. These profits were unduly high despite the excess profits tax. The whole report dealt with profits in terms of percentages of the contract price. It pointed out that the percentage of profits on sales was greater under uncompleted contracts than under completed contracts, and "that as the defense program progresses, the profits to the contractors are increasing and will tend to increase unless steps are taken to halt the trend." Much emphasis was placed upon this report by the Navy officers responsible for procurement. It also received very wide publicity at the time, the newspapers were full of editorials about the prevention of war profiteering, and the procurement officials of the Navy Department spent a considerable amount of time over the next several months in seeking to devise

²Hearings before the Senate Naval Affairs Committee on H. R. 6355, S. 2027, 77th Cong., 2nd Sess., Page 7.

³House Report 1634, 77th Cong., 2nd Sess.

some more effective means of administratively limiting profits under Navy contracts.

b. Study and Suggested Solutions within the Navy Department, February-April, 1942

77. From the end of January, 1942 on, the efforts of Navy procurement officials to find some solution to the problem of policing of costs and profits were redoubled. While no formal organization had been set up to deal with the matter, several groups were devoting most of their time to an investigation of ways and [107] means for limiting profits. The procurement personnel of the several Bureaus worked closely with the investigating personnel of the House Naval Affairs Committee, and were instrumental in suggesting to the committee most of the contractors whose profits were so large as to merit further investigation. The Department was during this same period attempting to work out a sound organization to handle the entire procurement problem, let alone the matter of war profits. It was on January 30, 1942, that the efforts towards coordinating the divergent procurement activities of the several Bureaus culminated in the establishment of the Office of Procurement and Material in the Secretary's Office.

78. At the Under Secretary's request I devoted a large part of my efforts during the months of February, March, and April, 1942 to working out some means of curbing profits under our contracts which would not interfere with the more important objective of obtaining the munitions and supplies required by the Fleet. I spent a great deal of time during this period in discussing this problem with representatives of the Procurement Branch in the newly

formed Office of Procurement and Material, the contracting branches of the several Bureaus, and the accounting personnel in the Bureau of Supplies and Accounts. During these three months the Under Secretary also brought into the Department several men with wide business experience who looked into the entire matter of profits under Navy contracts and who subsequently became members of the Price Adjustment Board (established several weeks prior to passage of the renegotiation statute). The problem of the right way (if there were any "right" way) of handling the problem was, however, still very much in the formative stages—it was not then possible to set up any [108] more definite organization to handle the matter of closer pricing and excessive profits. In February we held several discussions with representatives of the Army procurement services as to the best cure for excessive profits, and considered a proposal to include in war contracts clauses under which the contractor agreed to consider adjustment or renegotiation of the contract prices.

79. Early in March, I submitted to the Under Secretary, on behalf of the Navy group which had been studying the problem, some tentative conclusions. It was the consensus, first, that the Navy Department must continue to rely upon the "profit motive" as an important factor in inducing war production, but that nonetheless, executive profits had a bad effect on public and military morale and also tended to encourage demands for wage increases and decreases in labor efficiency. With respect to the proposal to limit profits to a flat percentage of the cost of performance of contracts, it appeared probable that industry would insist upon a floor under losses if it were to be subjected

to a ceiling upon profits. This floor under losses could be accomplished only under a cost-plus type of contract, which was expensive to supervise and audit, tended to reduce efficiency, and often permitted very high profits on a yearly basis; and the 7% limitation on the fee allowed under such contracts, while low for some businesses, permitted very high returns for other businesses. The amount of manpower and effort required to audit such contracts or to administer the flat percentage type of limitation under fixed-price contracts would be enormous and probably could not be drafted if this limitation were put into effect. With respect to excess profits, it was our position that corporations must be permitted to retain some portion of their profits in order to pre- [109] serve the influence of the profit motive and in such event the amount of profits before taxes in view of the extraordinary ballooning in some industries was often so large as to leave excessive profits even after taxes. There was no easy answer to the problem of effective profit control. It was my view at that time that we should attempt to do as much as we could by starting at the very beginning—in the negotiation of contract prices. The Government should be represented in such negotiations by experienced and skillful negotiators who would endeavor to see that the maximum of effort was produced at the right price. We realized then that in the light of all the imponderables, even skilled negotiators would be unable to achieve close pricing in many instances. It was recommended to the Under Secretary that experienced price negotiators be placed in each of the contracting Bureaus. This suggestion was discussed at considerable length in various meetings and bore fruit several months later in the es-

establishment of a Price Negotiation Section in the Bureau of Supplies and Accounts, which was ultimately extended to all of the Bureaus of the Navy Department.

80. At about this same time (early March, 1942) as a result of our several discussions within the Department, consideration was given to a proposed directive to be signed by the Secretary with respect to the allowance of reasonable profits on fixed-price negotiated contracts. It was proposed that prices be fixed to allow a profit of 6% generally, but up to 10%, of the estimated cost of the contract, to be determined on the basis of cost data and financial statements submitted by the contractor—in short, an embodiment in each contract of the Vinson-Trammell type of limitation, applied in advance. The directive was discussed in considerable detail on March 13, 1942, by representatives of the several Bureaus, the Special Assistant to the Under Secretary, Vice Admiral Robinson (Chief of the Office of Procurement and Material), and myself. We were agreed at this meeting that the proposed directive would tie the Navy Department completely to the percentage limitation of profits concept, with all of its inherent deficiencies. We therefore decided that we would not recommend that any such directive be signed by the Secretary at this time, and that we would attempt further to devise some effective means of control of profits within the Department. One feature of the proposal was revived several weeks later—namely, the requirement that the contractor submit statements as to the estimated cost of performance of his contract and other financial data in connection with the performance of Government contracts. Some time thereafter this did become the standard practice.

81. At this same time the War and Navy Departments and the War Production Board had been working upon the establishment in each of the three agencies of cost analysis sections, which would be able to point out profit danger spots and suggest administrative remedies therefor. On March 17, 1942, representatives of the Office of Procurement and Material who had participated in these discussions circulated a proposed outline of procedure for the establishment and workings of such sections. This suggestion provided for the close coordination of the proposed cost analysis sections in the three agencies, and provided further that the War Production Board would attempt to supply a check on the selection of contracts for cost analysis so that the program would not put an unmanageable burden upon the accounting offices of the three Departments. After further discussion of ways and means, the cost analysis sections were set up about [111] three weeks later. The War Production Board was to function primarily in analyzing the cost reports prepared by the War and Navy Departments.

82. In the latter part of March Messrs. Kenneth H. Rockey and Sylvan Coleman came into the Department at the Under Secretary's request to study the whole matter of excessive profits and closer pricing. Messrs. Rockey and Coleman went over the rather substantial data which we had by this time accumulated and spent considerable time with the contracting officers of the several Bureaus in reviewing contracting procedures and the methods then available for determining whether or not excessive profits were being earned. Both of them took a very active part in the discussions which were then occupying most of the time of the group studying the matter of excessive profits.

When the Navy Price Adjustment Board was established about April 20, 1942, Mr. Rockey was made its Chairman and Mr. Coleman was made a member of the Board.

83. In the course of our study, some of the cases of excessive profits enjoyed by subcontractors were brought to our attention. We learned of several instances in which the prime contractor with the Navy Department had given subcontracts to one of its subsidiary companies, and had included in its cost figures under the prime contract allowances for profits of subsidiary contractors. We sought to require representations by the prime contractor which would prevent any repetition of such practice. Of course, we recognized that any scheme of percentage-profit limitation tended to favor high profits for subcontractors; the prime contractor would not be interested in keeping subcontract costs or prices low, since the higher such costs or prices were, the higher the base on which his percentage of profits would be figured. Also, there were [112] some instances where work was subcontracted directly and the fee of the subcontractor was added to the fee of the prime contractor to make for double profits on the same work.

84. During the last week of March, 1942, the House Naval Affairs Investigating Committee held hearings on excessive profits being earned by several large Army and Navy contractors. These hearings were extensively reported in the newspapers, and the large profits earned by the Continental Motors Company and of Jack and Heintz received particular attention. The Naval Affairs Committee had received most of its data on these contractors from a joint audit which had therefore been undertaken by the Army and Navy. The hearings had the helpful

result of producing a number of meetings between Army and Navy representatives for joint consideration of the best means of limiting excessive profits. At such a meeting on March 25, 1942, it was concluded that each Department should have available an organization to which would be reported all cases wherein it was suspected that contractors were earning excessive profits. The meeting envisioned that these organizations would function about as follows:

a. All procurement officers would be advised of the establishment of the two organizations, and requested to refer to them for further investigation cases of excessive profits.

b. A conference would be called between the contractor and representatives of all Government agencies holding contracts with such contractor. At this conference, the profits would be considered with a view to obtaining for the Government a return of profits deemed excessive or a reduction of the contract price by the amount of such profits, whichever might be appropriate. [113]

c. The meeting contemplated that in the cases of recalcitrant contractors, resort might be had to compulsory orders under Section 9 of the Selective Training and Service Act; and further that in appropriate cases full publicity would be given to the excessive profits and the action taken.

The March 25th meeting further determined that immediate action along the lines indicated would be taken jointly by the services in the case of Continental Motors. In general, the War and Navy Departments were agreed that each case should be dealt with on an individual basis, although at the outset it might be advisable to approach

a group of contractors (perhaps those mentioned at the hearings of the House Naval Affairs Investigating Committee) and to deal with them in a body. It was agreed that the proposed action would be reported to the Congress to indicate the bona fide efforts being made by the War and Navy Departments to achieve answers to the problems of excessive profits. This meeting really represented the birth of the Price Adjustment Boards.

85. The War and Navy Departments thereafter discussed with the War Production Board this proposal to set up bodies to investigate war profits. Growing directly out of these discussions was the proposal that a Presidential Board be appointed to serve throughout the war for the purposes of studying the experience of other nations as to profit limitation, formulating a comprehensive program for the prevention of excessive profits, suggesting legislation and procurement policies as deemed appropriate, and dealing with special difficult cases. The proposal contemplated that Congress, the Army and Navy and other war procuring agencies would be able to look to such Board for guidance and advice. [114]

86. By the time this matter was brought up for consideration, however, H. R. 6790, the revival of the Vinson-Trammel percentage limitation, had been introduced (March 16, 1942); and Representative Case had introduced his amendment to H. R. 6868, providing for the renegotiation of contract prices to eliminate all profits above 6% (March 28, 1942). These proposals were discussed with representatives of the Army and the War Production Board, and representatives of the Navy presented to the House Naval Affairs Committee and to the Senate Finance Committee our views with respect to them,

and commented upon the several revisions of the renegotiation proposal which were submitted to us.

87. The passage of the Second War Powers Act, 1942, on March 27, 1942, afforded an additional weapon to the Navy Department and the other war procuring agencies in the investigation and determination of excessive profits. Title XIII of this Act allowed the agencies, when so authorized by the President, to inspect and audit the books and records of their contractors and to require such financial data as they desired. The President, by Executive Order 9127 dated April 10, 1942, delegated this authority of investigation and audit to the procuring agencies, subject to certain conditions. The Departments were enabled to go into the plant of any contractor and require the submission to them of all information as to profits.

88. The Cost Analysis Section and the Price Adjustment Board were formally organized in the Office of Procurement and Material about April 20, 1942, and were specifically called to the attention of all procuring officers of the Department by a memorandum circulated on April 24, 1942. [115]

89. The informal group which had preceded the formal establishment of these two organizations, the Bureau of Ships and the Cost Inspection Division of the Bureau of Supplies and Accounts, had meanwhile in the first four months of 1942 continued to readjust and renegotiate contract prices. The accomplishments of the Navy Department in reducing prices up through June of 1942 were summarized in the report of the House Naval Affairs Investigating Committee of July 22, 1943.⁴ The Commit-

⁴H. Rept. No. 2371, 77th Cong., 2d Sess., pp. 26-32.

tee had obtained the names of specific contractors investigated and a great deal of the data on the excessive profits which they were enjoying, from the Departments. The Committee included in its report a summary of the "actual monetary savings to the Navy Department" as a result of renegotiation of contracts. It indicated that the Navy had effected such savings to the extent of some \$88,000,000. While the Committee did not so indicate, the great bulk of this amount constituted reductions in contract price rather than returns of cash received by the contractors. Furthermore, as the Committee did point out, the renegotiations effected at that time would later show substantial results in lowering prices on new contracts for the munitions for which the original contracts had shown excessive profits. With respect to the ship repair and alteration contracts, the Committee remarked that refunds under these contracts amounted to \$7,000,000 (which is to be compared with the \$2,000,000 which had been recovered by the end of January, according to Captain Jones' testimony). As the volume of ship repair and alteration work had increased under these contracts, profits had expanded rapidly under rates which had been fixed in the absence of any adequate experience in this type of work. Under con- [116] tracts of this type, the Bureau of ships had been fairly successful in renegotiating profits to allow no more than 10% of costs (as compared to an average profit on such contracts prior to their readjustment of 30% of their cost of performance).

90. I am unable to present any concrete figures from the Navy Department as to the total cash refunds of profits by Navy contractors prior to April 28, 1942. Apparently all of the cash refunds were collected by means

of deductions from vouchers; no record had been kept of any such deductions, and it would be an interminable undertaking to examine the vouchers under each contract in the anticipation that they might reveal voluntary reductions in price. In addition, any recapitulation of the cash refunds would not show the whole picture, for most of the savings to the Government in the elimination of excessive profits were effected by means of price reductions.

c. Consideration of the Percentage Profit Limitation
Proposals

91. Meanwhile, the Congress had been considering several proposals to impose a percentage limitation of profits upon Government contracts, and there appeared at the time to be a very strong chance that such a method of limitation would be enacted by the Congress. These proposals, to which the Navy procurement officers were unalterably opposed, naturally spurred the efforts within the Department to arrive at a solution to the profit limitation problem. On March 16, 1942, there had been introduced in the House H. R. 6790, which proposed among other things to limit profits on all Navy contracts to 6% of the cost of performance thereof. The bill was referred to the House Naval Affairs Committee, which held a number of hearings upon it in late March and April 1942. [117]

92. Both Mr. Forrestal and Col. Knox testified with respect to H. R. 6790. Mr. Forrestal called attention to the vast amount of auditing work which would be necessary to enforce any such limitation, and discussed our experiences under the Vinson-Trammell Act. The Secre-

tary, who testified on April 16, 1942, brought out the immense variety of factors which affected profits under a particular contract and the impossibility of any single cure for excessive profits applicable to all contracts. He pointed out one very important consideration which the Congress had not thus far emphasized—the importance of reducing costs to the Government as well as profits. As he suggested, high costs and reduced profits often went hand in hand and high costs could be much more expensive to the Government than high profits.

93. The Navy had had some experience in the difficulties of obtaining good accountants and auditors to handle the growing dollar volume of cost-plus-a-fixed-fee contracts. In early 1942, there were in the Cost Inspection Service of the Bureau of Supplies and Accounts, which audited costs under these contracts, some 2700 accountants (most of whom were stationed outside Washington); in addition there were a substantial number of accountants in the Bureau of Yards and Docks, which audited its own construction contracts. H. R. 6790 proposed to have costs under Government contracts determined by reference to Treasury Decision 5000 (the regulation under the Vinson-Trammell Act), which was then used as a guide for auditing costs under the cost-plus-a-fixed-fee contracts. The determination of costs was a burdensome and time-consuming job, and there were substantial differences of opinion as to what items were properly allowable costs. The complete post-audit of expend- [118] itures under the cost-plus contracts by the General Accounting Office, after audit by the services, further complicated the difficulties of administering the cost-plus-a-fixed-fee contracts. It seemed clear that there would not be enough accountants

in the nation to scrutinize costs under every Government contract, as contemplated by H. R. 6790, in the same way that costs were scrutinized under the cost-plus contracts.

94. H. R. 6790 was tabled in committee, for the renegotiation bill had been brought to the fore by the Congress. Section 403 of H. R. 6868, as reported out by the Senate Appropriations Committee, contained in subsection (f) a graduated range of percentage limitations to be applied to Government contracts of different size. Representatives of the Navy Department joined the representatives of the other war procuring agencies in discussing this subsection with the Senate Committee, which ultimately agreed that the percentage limitation feature should be deleted.

d. Maximum Price Controls

95. The matter of price controls upon munitions was considered by the Under Secretaries of the Navy and War and the Price Administrator in late 1941. They decided at such time that it would not be necessary to set up any formal machinery for handling differences of opinion between the armed forces and the Price Administrator with respect to prices, but that each problem would be handled as it arose. The situation was changed substantially by the approval on January 30, 1942 of the Emergency Price Control Act of 1942. The armed services had in the consideration of the bill which became the Price Control Act recommended that munitions be expressly exempted thereunder, but their suggestion [119] was rejected. The possible imposition of maximum price ceilings on munitions pursuant to this Act was a rather unsettling factor in the whole discussion of possible

methods for control of profits during the next several months. At the time of passage of the Act, the Price Administrator had not determined upon a policy as to the establishment of ceilings for the purpose of preventing war profiteering and of controlling prices under contractors for war matériel. On the day the renegotiation statute was approved—April 28, 1942—the Office of Price Administration issued its “Big Freeze” order, the General Maximum Price Regulation, and its Machinery and Parts Regulation (Maximum Price Regulation No. 136). The coverage of these regulations included a great many items of completed munitions and almost all components thereof, although certain specified munitions were to be exempted from the price ceilings established under the Regulations. Broadly speaking, the General Regulation fixed the price ceilings by reference to the prices in effect during March 1942, and required specific authority from the Office of Price Administration for the fixing of ceilings where there were no analogous March 1942 prices; and the Machinery and Parts Regulation fixed ceilings by reference to the prices in effect October 1, 1941, and also required specific authority from the Office of Price Administration in cases where there were no analogous October 1, 1941, prices.

96. The issuance of these regulations precipitated an immediate and prolonged discussion between the armed services and the Office of Price Administration as to the desirability of fixing price ceilings for munitions and their components. As a stop-gap measure, the Price Administrator postponed application of the regulations to sales and deliveries under Army [120] and Navy contracts until July 1, 1942. In the latter part of May 1942, the Under

Secretary of the Navy established a liaison office in the Bureau of Supplies and Accounts, which was to integrate the price policies of the Navy Department and the Office of Price Administration insofar as possible.

97. It had been the position of the Army and Navy in all of their consideration of price control that it would be unwise and impracticable to apply price regulations to strictly military and naval equipment, and that attempts to do so ran the risk of impeding procurement of such equipment. It was felt that the services responsible for war procurement must have final power over prices; such services were charged with full responsibility for procuring the articles with which to fight the war, and proper prices might well be an inextricable element in such procurement. In the latter part of July 1942 the Under Secretaries of War and of the Navy notified the Price Administrator that while they recognized the necessity of adopting all possible means to prevent inflation, they felt that it was necessary to exempt military and naval supplies from the application of price ceilings. The Under Secretaries pointed out the difficulties inherent in effectively applying ceilings to munitions—e.g., the wide variety of conditions and uncertainties faced by contractors, the changes in specifications, inexperience of contractors, necessity of using all contractors and procuring all items regardless of cost. They further pointed out the probable impediment to production and procurement which the imposition of price ceilings would bring about, the undesirability of divided authority with respect to procurement, and the uncertainty and delay which would result from the application of the price regulations to Army and Navy contracts. Finally, they requested that “all

[121] articles which are designed and produced exclusively for military uses, and all subassemblies and parts of such articles which are themselves designed and produced exclusively for such military articles" be exempted from price regulation by the Office of Price Administration, with the exception of articles subject to regulation prior to June 30, 1942; that in questionable cases exemption be granted upon certification by the Secretary of War or of the Navy that the exemption was necessary for the prosecution of the war. The Under Secretaries pointed to the authority to renegotiate contract prices under the recently enacted renegotiation statute as a means at their disposal of controlling excessive profits and preventing inflation.

98. After further consultation, the Price Administrator responded in September 1942 by indicating that he would not extend maximum price control in the area of strictly military goods, provided he received assurances that the Army and Navy would use their powers to control both prices and profits in the exempted areas. He further indicated willingness to consider any requests for exemption of particular items at that time under formal price regulations. The Office of Price Administration agreed not to extend price control to sales of strictly military goods. It was understood that the exact line of demarcation between military and non-military goods would have to be more precisely drawn after conferences among the three agencies. The War and Navy Departments accepted the proposal as drawn by the Price Administrator, and agreed to furnish his Office with such information as it requested on the prices and procedures of the two Departments. Thereafter the armed services did establish

divisions which furnished to the Office of [122] Price Administration all information on prices requested by such Office.

99. Prior to the passage of the renegotiation statute, the top Navy officials in charge of procurement had spent a very considerable amount of time in seeking to evolve some answer to the extraordinarily difficult problem of limiting war profits while at the same time executing the vastly accelerated procurement programs.

100. There was virtual unanimity of opinion that the percentage limitation of profits was not a solution to the Navy problem—experience indicated that it was not effective and that it made contractors hesitant to take Government contracts. Indeed, it made many manufacturers want to become subcontractors rather than prime contractors. The limitation of adequate accounting personnel was an even more compelling practical reason for the rejection of this means of profit control. Similarly, we had neither the inclination nor the necessary personnel to extend the use of the cost-plus-a-fixed-fee contracts to fields wherein we were able to use fixed-price contracts. We knew from actual experience that exorbitant profits were being earned despite the recoveries under the excess-profits tax. The proposal to subject munitions to price ceilings had been seriously considered by the time of passage of the renegotiation statute, although the matter was not settled until the latter part of 1942.

101. The Navy Department was, then, in early 1942 in the position of opposing the known and theretofore attempted methods of limiting war profits, either because some of them were ineffective or because others would in

the opinion of those responsible for procurement seriously interfere with war production. We would quite frankly have preferred at this time to work out our own administrative solution to the problem of limiting profits under Navy contracts, primarily [123] through analysis of costs and closer pricing. The solution proposed by the Congress in the renegotiation statute, however, appeared to us to be a much better method than any alternative statutory method available. In retrospect, I believe that it is the better approach and that our earlier preference would not have solved the problem.

III. NAVY CONTRACT FORMS AND CLAUSES

102. The advent of the negotiated contract completely changed the form of the Navy contract and made necessary the use of much more intelligence and skill in the preparation of contracts.

103. Contracts awarded to the highest bidder after solicitation of competitive bids had all been based upon Forms 32 and 33 prescribed by the Procurement Division of the Treasury Department for all Government agencies. Such forms of contract, with their boilerplate provisions, were satisfactory only for simple deals, and proved quite inadequate for negotiated contracts. The first break away from these restrictive forms came in the preparation of construction contracts and contracts for the construction or installation of industrial facilities (in 1939 and 1940). In developing provisions for the facilities contracts—financing the contractor, purposes for which the facilities were to be used, rights of the parties upon the termination of the emergency period, and the like—it was obvious that the contract would have to be tailor-made

to fit the particular arrangement. Furthermore, in the course of drafting these various provisions to fit the procurement transaction, the boilerplate provisions were scrutinized and were often improved or made more appropriate. The grant of authority to negotiate certain contracts for vessels and supplies (in June 1940) further accelerated the process of [124] critical examination of the contract provisions and the drafting of intelligible new provisions to meet particular needs.

104. After enactment of the First War Powers Act, 1941, and the promulgation of Executive Order No. 9001, the Secretary removed entirely the restrictions of Form 32 in the preparation of negotiated contracts. The Secretary's directive of December 28, 1941, established a new internal Navy procedure for clearing contracts negotiated under the War Powers Act; in addition, it delegated to contracting officers complete discretion with respect to the form of such contracts, except for certain specified provisions required by statute or executive order. Under this delegation of authority, contracting officers were granted complete discretion to make advance, partial, and other payments on account of the contract price.

* * * without limitation as to amount and irrespective of any provisions of law as to security, liens (except as [to the lien in favor of the Government as permitted by the Act of August 22, 1911, 34 U. S. C. 582]) or otherwise, except that advance payments should be carefully scrutinized to determine whether such payments are necessary for the satisfactory performance of the contract in accordance with the terms thereof and as much security by means of controlled accounts or otherwise shall be

provided for as may be expedient under the circumstances of each case.

The directive further specified:

Such contracts [under the War Powers Act] may be made with or without competitive bidding as the respective contracting officers in their discretion may determine. There shall [125] be no limitation or restrictions as to form and substance of such contracts except [the contract clauses required by statute or executive order].

* * * * *

The contracting officers are authorized to select such procedures in making contracts as are deemed best fitted to the purchases involved and the needs of the Navy.

105. At this time all instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs, who transmitted such instructions to the officers under them responsible for preparing contracts. Since the great majority of Navy contracts were made by the Bureaus in Washington, these directives could be rather informally issued and distributed. In general, they gave a wide degree of discretion to the Bureaus in the preparation of contract provisions. As we began to pay more close attention to prices and the elements which went into prices, it became necessary to issue more detailed instructions relative thereto; it was not until October 1943, however, that we were able to collect the contract directives in one place, arrange them, and issue them in a loose-leaf volume (the Navy Procurement Directives).

106. I shall summarize very briefly the more or less common Navy contract provisions prescribed in the first several months of 1942 for the determination or adjustment of prices or costs.

i. Changes

107. All Navy contracts included provisions for changes in the work covered thereby. The changes clause in all Bureau of Ships contracts was broader than that in other contracts made by the Navy. [126]

The Bureau of Ships clause provided:

The Secretary of the Navy, at any time and without notice to the sureties, may make changes in this contract including the General Provisions, the plans or specifications of this contract, *within the general scope thereof*.

This type of clause had been in ships contracts since the 1880's. The broad language of the clause had, by construction, been somewhat limited in scope. The clause was eliminated about a year ago, and the ships contracts now contain provisions limiting changes to the work under the contract, as in the other Navy contracts.

108. With respect to changes in price upon a change in specifications or in the work under the contract, the more or less standard clause for fixed-price contracts provided that if the changes caused an increase or decrease in the cost of performing the contract, "an equitable adjustment" would be made and the contract modified in writing accordingly; facilities and cost-plus-a-fixed-fee contracts provided that upon the making of changes "an equitable adjustment of the estimated cost and the fixed

fee would be made and the contract modified accordingly." In the event of failure to agree upon a change in the fixed price or fixed fee, the matter was to be decided by the contracting officer pursuant to the disputes clause of the contract. The cost-plus-a-fixed-fee contracts for vessels provided specifically that if the estimated costs were changed as a result of changes in specifications, the fixed fee, which was stated to be about 7% of the estimated cost, should be changed by 7% of the change in the estimated cost.

ii. Payments

109. The contracts provided specific procedures for submission of invoices covering costs under cost-plus [127] and facilities contracts, and for prices of goods delivered under fixed-price contracts. These provisions varied substantially among the different types of contracts.

110. Fixed-price contracts for vessels called for partial payments as construction of the vessel progressed. The provisions for advance payments under fixed-price contracts specified that lien should be established in favor of the Government on the materials and property acquired by the contractor. In some instances controlled accounts were established, providing a check by the contracting officer upon the advance payments to the contractor; the advance payments clauses were at this time relatively simple as compared to clauses presently in use.

iii. Insurance and bonds

111. All contracts required the contractor to carry insurance on the property produced or acquired thereunder, and to carry workman's compensation and other third-party liability insurance with respect thereto. The

Government generally undertook to make the contractor whole for losses sustained in excess of the amounts covered by insurance taken out at the direction of the contracting officer.

112. After passage of the War Powers Act, performance and other bonds were largely dispensed with, although they were still required for certain standard supply contracts made by the Bureau of Supplies and Accounts. In any event, the performance, payment and similar bonds had never been of much use to the Navy. It had invariably proved impossible to obtain bonds at any cost in the cases where they were most needed. Generally the cost of bonds was high and the amounts of coverage in the case of large contracts were entirely inadequate to protect the Government. [128]

iv. Patents

113. Whenever patents were involved in the procurement, the standard clause of the Treasury Procurement contracts was used—the contractor agreed to hold the Government harmless against claims for infringement of patents in the performance of the contract. Some ships contracts contained the further requirement that the contractor not pay any sum for royalties or patent rights not included in the ordinary purchase price of parts embodied in the ships, unless and until duly so authorized by the contracting officer. No real progress was made in the matter of controlling royalties and other payments relative to patents under Navy contracts, and in drafting patent clauses which adequately protected the interests of the Government, until after the Procurement Legal Division was authorized to handle such matters in August, 1942.

v. Termination

114. Navy contracts (except Bureau of Ships contracts) at this time provided that in the event of cancellation for the convenience of the Government, the Navy would pay the contractor for all costs including a proper allocation of overhead expense to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfinished goods, for which the contractor was reimbursed at cost. This provision differed from the clause then used by the Bureau of Ships and the Army, which calculated the profit on the estimated extent of completion of the contract—the contractor was paid a percentage of the total profit equal to the percentage of completion. The use of any clause was a vast improvement over the practice in the first World War, when contracts did not contain any termination clauses. [129]

115. Navy contracts, other than ships contracts, also had included clauses authorizing termination for default, corresponding to the delays-damages clause of the old Treasury Form 32—if the Government terminated for default in delivery, it had the right to purchase the goods elsewhere and surcharge the contractor for any additional costs incurred by reason thereof by the Government.

116. After the First War Powers Act, the Navy dropped almost entirely the liquidated-damages clause. At this time there were frequent delays due to changes in specifications, material and labor shortages and the like, and it was often if not usually difficult to hold the contractor responsible for delays in deliveries. In addition,

contractors were extremely reluctant to take contracts containing such clauses. As the Navy was interested in getting the goods themselves, and not money damages, it determined to omit this clause generally.

vi. Guarantees

117. Most contracts in early 1942 contained a clause under which the contractor undertook to guarantee for a certain period the performance or durability of the articles covered by the contract in conformity with the specifications. This period varied from 3 months to a year or more. The contractor further undertook to correct or repair at his own expense any deficiencies or failures in the contract articles during such period. The ship contracts provided for trials, and adjustments and corrections by the contractor of the vessels during such trials. If the contract was a fixed-price contract, the contractor would often include large contingencies in his prices to cover possible expenses during the guarantee period. Since 1943 and 1944 the period of the guarantee has been shortened, and [130] the clause has been entirely eliminated in a few cases from Navy contracts.

vii. Escalator clauses in fixed-price contracts

118. Most fixed-price contracts for any substantial amount in late 1941 and early 1942 contained provisions for adjustment in price upon changes in material or labor costs. I should estimate that a majority in dollar amount of fixed-price contracts executed during this period contained escalator clauses. These clauses varied substantially in scope and in the index selected to measure increases in costs.

119. Some of the more primitive types of clauses had attempted to protect the contractor to the full extent of any cost changes. Almost all of the clauses in use at the time the renegotiation statute was being debated, however, attempted to protect the contractor not against all variations in the cost of labor and materials, but only against such changes in those costs as might be attributed to general changes affecting the entire national economy and thus wholly beyond the contractor's control. The basis for calculating changes in costs under the escalator clauses were in most cases indices representing wage levels (either general or for a specific industry) and material costs, usually indices published by the Bureau of Labor Statistics.

120. The most important determination in any escalator clause was the selection of the base to which the percentage of change in a selected index is applied in order to calculate the permitted adjustment of the contract price. The base selected varied widely among the several contracts, and was often extremely complicated to compute—requiring in some cases substantial cost accounting. All of the escalator clauses are rather complicated to apply. The computations [131] under most of them were made by the Cost Inspection Service of the Bureau of Supplies and Accounts. We have subsequently discovered certain errors in the drafting and application of certain clauses, whereby increases were computed on costs including the price increases against which the escalator clause was designed to protect the contractor. We corrected such increases as they were called to our attention.

121. All escalator clauses are to some degree inflationary and are harmful in that respect. The device had

many disadvantages—it was used only because the Navy could not persuade contractors to take contracts on any other basis. Because of the uncertainties as to labor and other costs and the impetus to inflation which any war provides, contractors refused to run the risk of being tied to a fixed-price under a long-range contract. Escalator clauses were to be used only in long-term contracts. Our need for munitions was so great, however, that we could not quarrel very much over inclusion of such provisions. It must not be assumed that because an escalator clause was included in a contract, the price fixed therein did not include any allowance for contingencies. As has been made quite evident later, the price did include substantial allowances for contingencies. Furthermore, as I have indicated, the escalator clause was not a complete answer to the contractor's insistence upon protection. The clause purported to protect him only against certain direct labor and material price increases and did not protect him against other labor and material costs or other indirect costs which were subject to real fluctuation. The device was an imperfect one which it was necessary for us to adopt in order to speed procurement. Even with the elimination of the risks covered by the escalator clauses, contractors were able in some instances to make profits aggregating 50% or [132] more of cost as witness the ships contracts which I earlied cited.

122. On January 30, 1942, the Emergency Price Control Act was approved. The adjusted increases in contract prices under the escalator clause had to stop at any ceilings established by the Price Administrator on articles purchased or produced under the contract. At that time it was not known just how the Act would affect price

escalation; subsequently specific escalator clauses have been worked out for contracts covering certain materials subject to OPA ceilings.

IV. NECESSITY OF THE RENEGOTIATION STATUTE

123. Had the renegotiation statute not been enacted, I am convinced that Navy procurement would have been affected in the following ways, among others:

- a. greater use of cost-plus contracts;
- b. enforced use of mandatory orders to obtain munitions with respect to which agreement on price could not be reached;
- c. reluctance on the part of contractors to take prime contracts, including preference for subcontracts; and
- d. excessive profit and waste.

These probable results are to a large degree all tide together. We should have found it more and more difficult, I believe, to allow the large contingencies demanded by contractors in fixed-prices, and should therefore have been driven to a much wider use of the cost-plus-a-fixed-fee contract and the mandatory order. I have earlier described the lack of incentive to reduce costs which is inherent in the form of the cost-plus-a-fixed-fee contract, and the large number of auditing personnel required to determine allowable costs under such contracts. Mandatory orders constitute a somewhat ponderous means of procurement, and leave the [133] Government with the pricing problem still on its hands, plus possible court proceedings. There can be little doubt but that profits would generally have been larger in the absence of re-

negotiation. After a study of the complex problem of limiting profits in war to fair and reasonable amounts—the problem both as we faced it in the past and as we have faced it in this war—I know of no other type of profit limitation which can take into consideration the many diverse factors affecting the profits of different contractors and fairly adjust those profits, as adequately as does the renegotiation process. The growing Congressional and public criticism of exorbitant war profits in 1941 and 1942 would have resulted in an increasing reluctance on the part of manufacturers to take war contracts, and eventually in some form of profit limitation less palatable and less equitable than renegotiation. I am strongly of the opinion that, while the Government should consistently seek to improve its negotiation procedures in arriving at close prices, the problems of war procurement render impossible any completely satisfactory solution of the problem of initial pricing. Renegotiation, which affords a review of prices after the contractor has had the cost experience in the performance of his contracts, is to my mind an essential part of wartime procurement, today as well as in early 1942.

H. STRUVE HENSEL.

Sworn and subscribed before me this 16th day of July, 1945.

(Seal)

LUCILLE HOLLAND,

Notary Public, D. C.

My Commission expires Sept. 1, 1946.

[Endorsed]: Filed Jan. 28, 1946. [134]

[Title of District Court and Cause]

AFFIDAVIT OF ROBERT P. PATTERSON

District of Columbia, ss

Robert P. Patterson, being duly sworn, deposes and says:

1. I am Under Secretary of War of the United States and have held that office, which was created by the Act of December 16, 1940, 54 Stat. 1224, since December 19, 1940. From July 30, 1940 to December 19, 1940 I was The Assistant Secretary of War.

2. By authority of various statutes and by various delegations of authority from The Secretary of War, I am, and have been both as Under Secretary and as The Assistant Secretary of War, charged with the supervision of the procurement of all military supplies and of other business of the War Department and the Army pertaining to production and procurement.

3. The statements made in this affidavit are based upon information acquired by me in my official capacity and which I believe to be true and accurate.

Preliminary Statement

4. Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. Industry is called upon to produce an entire complex of new products, constantly changing in design and purpose. Quantities of both old and new products, far beyond those previously manufactured, are suddenly demanded, and in the shortest possible time. For the production of

these needed items, [136] existing plants, machinery and equipment have to be converted from producing peacetime civilian goods to meet the different and expanded needs of the armed forces. Even the marginal producers have to be used in order to meet these needs. In addition, hundreds of new plants, new machinery and new equipment have to be constructed, installed, and put to work. The nation's manpower has to be reallocated, almost overnight, to adjust to the gaps caused by the transfer of millions from production to the armed forces, and to the springing up of new industries and new areas of production. Enormous dislocations in transportation, and in the supply of raw materials have to be ironed out.

5. The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; it is likewise true, though perhaps in lesser degree, wherever the quantities to be manufactured are sharply increased over pre-war amounts. Accordingly, advance prices quoted in good faith by manufacturers in a large number of cases have little relation to costs actually experienced in the course of production. Furthermore, many manufacturers feel unable to quote firm prices without including reserves to cover many contingencies

the occurrence of [137] which might skyrocket their costs, and so overturn all their estimates.

6. These were the conditions of wartime procurement, after December 7, 1941, and the War Department had to force its procurement activities into their mold. Efforts were made, of course, to develop contractual devices which would minimize the paramount difficulty in estimating production costs. The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage of removing financial incentives to efficiency and of imposing a heavy burden of auditing upon the Government and the contractor. Escalator clauses, permitting prices to be adjusted according to fluctuations in indices of labor and material costs, were also used but proved unworkable. Letters of intent, under which manufacture was commenced prior to the negotiation of a formal contract, helped to speed production, but could not, of course, solve the ultimate problem of decreasing costs and preventing excessive profits.

7. Shortly after the declarations of war, both the legislative and the executive branches of the Government realized that excessive wartime profits were certain to accrue unless counter measures were taken. The evil effect of such wartime excessive profit on the morale of the fighting forces and the civilian population, as well as the unnecessary financial burden upon the Government, could not be ignored. The example of the last war was still fresh. Many war contractors realized the dangers and inequities resulting from such excessive profit, and some of them made refunds of excessive profits or voluntarily reduced their prices. In the spring of 1942, the War Department developed cost analysis units to check,

so far as practicable, on production costs, and set up a price adjustment board [138] to negotiate with contractors for voluntary price reduction and refunds of past payments. Tentative policies as to what profits were excessive were established and meetings with contractors had. At the same time, there came into use contract clauses providing for the renegotiation or redetermination of contract prices after an initial period of production had laid a basis for the proper estimation of costs. We hoped that these means would keep incentives to efficiency alive and at the same time would tend to eliminate undue profits such as were then coming to light.

8. The Congress apparently felt, however, that these contractual measures, resting as they did upon the voluntary cooperation of a relatively small number of war contractors, did not provide enough certainty that excessive profits would be eliminated. The Vinson-Trammell Act, limiting profits on aircraft and ship construction, had been repealed in 1940, but an effort was made to revive it. In March, 1942, the War Department and the War Production Board opposed such legislation on the ground that a flat percentage profit limitation would impede production and would be unfair to many contractors and too generous to others. After the Case amendment imposing such a flat percentage limitation on profits from war contracts had been adopted by the House of Representatives late in March, 1942, the armed services and the War Production Board offered a substitute proposal giving statutory authority to the process of voluntary renegotiation which had been developing. Congress adopted the principle of renegotiation with which the armed services were in accord (rather than the principle of a

flat percentage limitation of profits), and it also endowed the procuring agencies with power to [139] determine excessive profits when no bilateral agreement could be reached with the contractor. I believe that this addition by the Congress of the power of unilateral action was a wise and a necessary one, and that without it renegotiation would not have accomplished anything like the results that have been achieved.

9. The purpose of this affidavit is to present the facts showing in greater detail, (a) the nature and extent of the procurement problems of the Army after the declaration of war, (b) the need for renegotiation and limitation of profits of war contractors and the steps which had been taken in that direction prior to the enactment of the renegotiation statute, and (c) what statutory renegotiation has accomplished.

The Army's Procurement Problems Subsequent to the Declaration of War

10. Immediately after the attack on Pearl Harbor, on December 7, 1941, the War Department's procurement program was sharply accelerated to meet the new requirements imposed upon the country and the Army by the sudden involvement of the United States in the war. The defense procurement program had been large, but the effort was minor in comparison with that necessitated by the demands of active warfare. Supplies, equipment, housing, ammunition, and weapons had to be secured, in the least possible time, for our rapidly expanding armed forces, and for the anticipated needs of a war to be fought on two sides of the globe. In addition, increased supplies for the nations with which we were allied had to be pro-

duced with the greatest possible speed. All phases of procurement were stepped up: production of the weapons of war, such as guns, planes, tanks; construction and equipping of camps; procurement of equipment and supplies for the troops; construction of plant facilities; [140] production of the means of communication and transportation.

11. The extent of the problem facing the procurement agencies can be judged from the goals set by the President in his message to Congress of January 6, 1942. The President stated:

I have just sent a letter of directive to the appropriate departments and agencies of our government ordering that immediate steps be taken:

First to increase our production rate of airplanes so rapidly that in this year 1942 we shall produce 60,000 planes, 10,000 by the way, more than the goal that we set a year and a half ago. This includes 45,000 combat planes, bombers, dive bombers, pursuit planes. The rate of increase will be maintained, continued, so that next year, 1943, we shall produce 125,000 planes, including 100,000 combat planes.

Secondly, to increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks, and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

Third, to increase our production rate of anti-aircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them, and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

And fourth, to increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons, as compared with a 1941 completed production of 1,100,000. And finally, we shall continue that increase so that next year, 1943, we shall build 10,000,000 tons of shipping.

Illustrative of the tremendous undertaking facing both American industry and the procurement agencies is the fact that the total number of planes (military, commercial, and private) produced from 1903 to 1940 [141] was some 33½ percent less than the number scheduled for the year 1942 alone, and that procurement of planes for the Army during 1942 was over 250% greater than in 1941. For the fiscal year ending June 30, 1942, the money appropriated for War Department procurement and construction was more than six times the amount appropriated in the fiscal year 1941. One-third of the total was appropriated by the Congress in the first half of the fiscal year 1942, before the United States had been attacked; after Pearl Harbor, the Congress tripled the new procurement funds made available earlier in the fiscal year.

12. To fulfill the requirements of this expanded war program, a vast number of contracts had to be made, as quickly as possible, for supplies, weapons, and munitions of all kinds. Attached as Exhibit A is a chart (based on information furnished by the War Department Board) showing the number and dollar value of contracts for all types of war materials entered into each month from July 1941 through June 1942 by the various procuring agencies. The tremendous increase which occurred in January 1942 and continued through the remaining months of that fiscal year is clearly shown by this chart. In November,

1941, the total dollar value of such contracts was \$1,506,-000,000; in December it jumped to \$3,131,000,000; and in January 1942 to \$9,456,000,000; in the remaining months of the fiscal year it never fell below \$4,800,-000,000. The chart, it should be noted, understates both the total number of contracts and their total dollar value, since it excludes (1) contracts with a value of less than \$50,000 (of which there were a vast number), (2) contracts for subsistence, and (3) construction contracts. An idea of the comparison between the total number of contracts entered into by the War Department prior to [142] Pearl Harbor and thereafter can be gained from the fact that the number of contracts for the fiscal year ending June 30, 1941, was 667,364, while that for the four months of July, August, September, and October 1942 alone was 1,408,141. All these figures concern only prime contracts, but the vast stimulating effect of this expanded volume of prime contracts upon subcontracting of all tiers is readily apparent. On December 31, 1941, War Department obligations for supplies and new capital facilities amounted to more than 9 billion dollars, but on June 30, 1942, they amounted to nearly 43 billion dollars. War Department expenditures for delivered supplies were nearly 4 billions on December 31, and were more than 13 billions on June 30. In the last six months of the fiscal year ending June 30, 1942, War Department contractual activity and the delivery of supplies were four times greater than in the first six months. Some conception of the vast scope of the procurement activity of the armed services after the attack on Pearl Harbor can be gained from the fact that the total expenditures of the War and Navy Departments for the one fiscal year ending June 30, 1942 (\$22,905,000,000) considerably ex-

ceeded the total military and naval expenditures of the Government from 1789 through the end of World War I.

13. To meet these accelerated demands, the armed forces had to call, in largest measure, upon private industry which, prior to December 7, 1941, was devoting only 25% of its total production to defense work, and of this amount, by far the largest proportion resulted from the use of existing idle capacity and the establishment of new facilities rather than from the conversion of existing facilities geared to civilian production. Little stoppage of civilian pro- [143] duction had occurred prior to December 1, 1941. If the imperative needs of the armament program were to be satisfied, wholesale conversion of existing production facilities to a war economy would have to occur. By the end of 1942, the proportion of manufacturing industry devoted to war production amounted to upwards of 45%, and presently this percentage is estimated at 60%. Some of this increase is, of course, attributed to the continued construction and use of new facilities, but the greater part of it has come from conversion of existing facilities since December 1941.

14. The armed forces were thus forced to grapple with major difficulties stemming from (a) the greatly increased demands for supplies of all types, (b) the accelerated program requiring immediate production, and (c) the urgent and rapid conversion of the great mass of American industry to war work and the large-scale use of new facilities. Other acute problems were caused by (d) the demand for new products not previously manufactured, and by the constant modification of specifications to reflect improvements in design or changing needs, and (e) by the current uncertainty in the amounts of matériel to be

procured, and the grave difficulties in the supply and cost of labor and matériel which were daily arising at that time:

(a) The greatly increased demand for supplies made the accurate forecasting of costs very difficult. Starting costs were bound to be higher than those incurred after mass production had begun; but the extent to which quantity production would bring a sharp drop in costs could not be estimated either by the Government or by contractors, and the latter were naturally very cautious in prophesying about their future costs. This was frequently true in the case of standard articles previously manufactured in small quantities and was uniformly true in the case of new products. [144]

(b) The urgent need for placing orders and starting production as soon as possible placed the importance of speed far above thorough analysis or careful negotiations. Time was of the essence, and the Government personnel entrusted with negotiation and procurement were, of necessity, too few and too overburdened to follow the normal procedures of careful procurement. There was simply no time to collate and check the cost information which in less abnormal times would be required; and, of course, such cost information pertinent to wartime production was frequently nowhere obtainable.

(c) The conversion of peacetime facilities to war work meant that cost data for the new production were unavailable, even for established plants. And in the hundreds of new plants producing war goods, only the roughest guess as to the costs of manufacturing which would be experienced during actual production could be made. Marginal producers, and those with no experience

with the product or with the greatly increased quantities they would be called upon to produce, had to be used.

(d) War on the scale and under the conditions we are fighting calls for unceasing development, production, use, and improvement of countless new supplies and weapons. The demands of amphibious warfare, for instance, led to the development of amphibian boats and cargo carriers. The mechanization of modern warfare forced the development and rapid production of such items as tanks and motorized gun carriers as well as of the weapons employed against them: anti-tank guns and grenades, armor-piercing ammunition, self-propelled mounts, and anti-aircraft guns. The spurt and rapid changes in aircraft development [145] are common knowledge, as the growth of communication and detection devices. Changes in design and material also frequently resulted from shortages of previously used components. The use of steel had to be severely limited wherever a less critical material could be substituted. Motor vehicle cargo bodies, for example, were converted from steel to wood. Acute shortages of copper and brass led to other changes in accepted design. Great use was made of plastics in order to release critical metals. This activity can be partly epitomized in the summary statistic that during the fiscal year 1942 approximately 1,200 Army specifications were reviewed, and revised or approved; and about 425 specifications were completely cancelled.

(e) Material and labor shortages were acute in the spring of 1942. The consequence was that it was generally difficult, except within the widest limits, to establish accurate schedules for the production of supplies. The Army's requirements had to be drastically reduced,

in the months from February to June 1942, because of these factors, and these changes and reductions were reflected in the War Department's procurement program. An equally important consequence was the difficulty of gauging both the costs and the time of performance because of the shortages and anticipated rise in the costs of labor and materials.

15. All these factors made advance pricing a haphazard process in which the war procurement agencies could put little trust. The situation with which we were faced is well summarized in the following two statements (one by a Government agency and the other by a large war contractor) with which I am in full accord and which I believe to be an accurate description of the procurement situation as it existed after the coming of the war. The following is an excerpt from the Introduction to the Renegotiation Regula- [146] tions issued by the War Contracts Price Adjustment Board:

The war program creates problems of procurement and production unprecedented in scale and complexity. War materials of all kinds are required in enormous quantities with the greatest possible speed. The munitions program expanded with such rapidity that contracting officers were hard pressed to place contracts in time to meet the accelerated requirements. In order to avoid delay, they had to make contracts without adequate data. Obtaining the material was the first issue. Many contractors were asked to produce articles which had never been produced before and which were subject to frequent change. Others were asked to produce articles which were new to them. Still others, who had produced

articles in small quantities, were asked to produce them in amounts far beyond their previous experience. Quantities needed, the rates of delivery and specifications had often to be revised in the light of experience and the demands of war. Shortages of material, priorities, and allocations increased the uncertainty of production.

Besides these circumstances, contractors and contracting officers were frequently unable to make an accurate forecast of costs on which to base prices. During the period of transition, costs were certain to be high. New facilities had to be obtained, new personnel employed and trained to new methods and new sources of supply developed. How long this would take was itself uncertain. After the contractor got into production, greater efficiency, improved methods, and increased volume could be expected to reduce costs sharply.

The following are excerpts from a report by the General Motors Corporation, in September 1943, to the War Department Price Adjustment Board: [147]

With the advent of the war-production program, the automatic check on pricing policy which had been furnished by competition during peacetime could no longer be relied upon. The Corporation was obliged to undertake the manufacture of many products which were entirely foreign to its own past operations. In many instances, these products had not been produced by any manufacturers in the volume contemplated by the war program. As a result, there was no ready-made yardstick against which the Corporation

could measure proposed prices, and it became necessary to rely largely upon the judgment of the several general managers of the operating divisions and the Government contracting officers, as well as whatever limited experience might be available from other producers, as to the reasonableness of the cost estimates and prices submitted. In certain cases, the only practical solution of the pricing problem has been to insert clauses into contracts providing that prices would be reviewed as soon as representative cost experience had been obtained as a result of volume production.

Under these circumstances, it has been impossible to predict with any degree of certainty what the operating results of particular contracts might ultimately be. It therefore became imperative for the Corporation to establish as soon as possible a basic pricing policy which would take into account these unusual conditions and insure that proper and effective pricing control would be obtained. In establishing this policy, the primary considerations were twofold. First, it was recognized that in producing war material, the checks of normal competition had been removed, and that the peacetime conception of desirable profit margins, as previously described, had to be modified. Second, it was considered essential to maintain, as far as possible, the Corporation's normal method of doing business on a decentralized basis, with primary [148] responsibility for contracting, pricing and production resting upon the divisional general managers, subject to the over-all general policies of the Corporation. * * *

The policy of taking contracts on a fixed-price basis whenever practicable was adopted (despite the increased risk) because of the greater incentive to efficient operation afforded by this type of contract as compared with the cost-plus-fixed-fee type. However, it was recognized that the divisions were undertaking the production of war materials which were not only new to the Corporation, but had not been manufactured by any one on a "mass-production" basis. Therefore, there was always a possibility that initial cost estimates on certain contracts, even though they appeared reasonable to the divisional general managers and to the Government contracting officers at the time the estimates were prepared, might turn out to be higher than actual costs of production as volume increased, when designs were changed, and as manufacturing experience was obtained. * * *

16. A graphic illustration of the way in which all the factors of uncertainty listed above combined to make the advance estimation of costs extremely difficult in 1941 and 1942 is furnished by the experience of the General Motors Corporation. That company is one of the largest peacetime manufacturers of automotive products, its accounting and auditing procedures are superior, and its ability to forecast the costs of manufacture of automotive products would far outrun that of most other producers. Nevertheless, as the company itself fully realized (see paragraph 15 above), even it was in no position to estimate its costs with any acceptable margin of accuracy. General Motors accepted contracts containing redetermination provisions, under which an original price based on the best available estimate of costs was established, with revisions

made after [149] the costs of a preliminary run of 1,000 units and a test run of a further 1,000 units were available. The price for the remainder of the contract was determined on the basis of the test run. The results obtained under two of these contracts were as follows:

a. *Medium Tank* (per unit):

Original price (middle of 1941).....	\$67,401
	<i>Estimated redetermined value</i>
Preliminary run (March 1942-December 1942), 1,000 units (including preproduction expenses).....	\$50,947
Test run (December 1942-February 1943), 1,000 units.....	39,079
Remainder (February 1943-August 1943), 1,053 units.....	39,285

b. *Light tank* (per unit):

Original price (set during 1941).....	\$45,000
	<i>Estimated redetermined value</i>
Preliminary run (April 1942-October 1942), 1,000 units.....	\$34,625.99
Test run (October 1942-December 1942), 1,000 units.....	26,972.96
Remainder (December 1942-February 1943), 1,266 units.....	28,347.09
2nd Preliminary run (Feb. 1943-June 1943), 1,000 units.....	24,658.65

c. The following table illustrates the sharp decrease in costs following a sharp rise in quantity of production, and the gaining of manufacturing experience. The figures represent revisions of General Motors Corporation's price for the .50 cal. heavy barrel machine gun:

	Units	Price
Original price (Aug. 1941-Dec. 1941).....	1,308	\$868.07
1st revision (Jan. 1942-Mar. 1942).....	2,830	632.55
2nd revision (Apr. 1942-May 1942).....	3,247	532.00
3rd revision (May 1942-Sept. 1942).....	14,717	413.60
10th revision (June 1943-Aug. 1943).....	3,500	300.59

17. Faced with these difficulties of estimating production costs and also with the pressing need for speed in procurement, the War Department naturally chose to emphasize, after December 7, 1941, the speedy placing of a mass of contracts. Pressure to obtain supplies was already great before the attack [150] on Pearl Harbor, but thereafter it was made even clearer to contract officers that they were expected to place the increasing load of orders assigned to them with the least possible delay. The war would not rest to allow proper negotiation, and the War Department made it clear that the primary goal was speed in obtaining the necessary equipment and supplies. Illustrative is P. & C. General Directive No. 8,¹ issued January 14, 1942 (attached hereto as Exhibit B), which stated that "price is a secondary consideration as compared with speed and efficient production," and "speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. * * * War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field." War Production Board Directive No. 2, March 3, 1942, placed "primary emphasis * * * upon securing delivery in the time required by the war program." P. B. General Directive No. 34, dated April 9, 1942, which coordinated War Department rules concerning purchases, reiterated the WPB

¹P. & C. General Directives were issued, under my direction, by the Purchases and Contracts Branch of the Office of the Under Secretary of War; this branch later became the Contract Division, and the directives were entitled CD General Directives; in March 1942, the unit became the Purchases Branch, Procurement and Distribution Division, Headquarters, Services of Supply, and the directives were entitled PB General Directives.

standards and added that in giving effect to these policies "it is recognized that it may be necessary to purchase at other than the lowest price offered."

18. To implement this policy of speedy procurement, and at the same time to adjust, as best it could, to the conditions of wartime production, the War De- [151] partment adopted several procurement devices and policies.

a. Peacetime War Department procurement, with certain exceptions, was accomplished through advertising for bids. At the beginning of the general emergency it was foreseen that this method would prove impracticable for emergency procurement, and the Act of July 2, 1940 (Public No. 703, 76th Congress) authorized contracting without advertising for national-defense purposes. This authority was widely used for the purchase of such supplies as aircraft and tanks, but in many fields it was believed that the Government could still avail itself of the safeguards of letting contracts by advertising. After the declaration of war, however, it was seen that negotiation would have to supplant advertising almost entirely. The increased need for speed in procurement, the necessity of employing even high-cost producers, the unfamiliarity of most contractors with the products or the quantities they were called upon to manufacture, and all the uncertainties of the period described above, combined to render advertising unsuitable to wartime procurement. Accordingly, on December 16, 1941, the Secretary of War issued a directive broadly extending the authority to make procurements without advertising, and by directive of December 17, 1941 (P. & C. General Directive No. 81) I ordered "that the authority to place orders without advertising be utilized in all cases where that method of

procurement will expedite the accomplishment of the war effort." The First War Powers Act of 1941 (approved December 18, 1941), and Executive Order No. 9001, issued December 27, 1941, confirmed and extended the power to make contracts by negotiation, and thereafter the use of that method became dominant in Army procurement. [152] On March 3, 1942, War Production Board Directive No. 2 required all of our war contracts to be negotiated (unless specific authority to advertise were granted), and on March 4, 1942, this rule was made effective in the War Department by CD General Directive No. 25.

b. Speed in procurement and the utilization of all available producing facilities required decentralization of procurement, increased subcontracting, and widespread distribution of war orders. (1) Prior to December, 1941, considerable decentralization had been effected; the limits of the dollar amounts of contracts which could be approved by echelons below the office of the Under Secretary of War had gradually been raised to \$500,000. On December 16, 1941, the Secretary of War directed a sweeping decentralization of procurement, and on the next day I issued P. & C. General Directive No. 81, empowering the chiefs of the supply arms and services to approve contracts up to \$5,000,000, and authorizing them to decentralize still further. This directive stated that "In order to enable orders to be placed in the quickest possible time, it is desired that chiefs of supply arms and services decentralize to their field agencies the actual work of procurement and the placing of awards and contracts to the greatest extent compatible with efficiency and proper safeguarding to the public interest." (2) Subcontracting

had also been fostered from the beginning of the emergency, since it was foreseen that full defense production could not otherwise be achieved. With the outbreak of the war, P. & C. General Directive No. 8, dated January 14, 1942 (Subject: "Selection of Contractors for war production"), strongly emphasized this need and required procurement officials to insist upon subcontracting: "The heavy procurement program and need for speed in pro-[153] duction make vital the best utilization of every facility." (3) For the same reasons, the policy of the widespread distribution of defense orders was adopted. This policy was partially crystallized in War Production Board Directive No. 2, March 3, 1942, which stated "that contracts shall be placed so as to conserve, for the more difficult war-production problems, the facilities of concerns best able, by reason of engineering, managerial, and physical resources, to handle them. Accordingly, contracts for standard or other items which involve relatively simple production problems shall be placed with concerns, normally the smaller ones, which are less able to handle the more difficult war-production problems."

c. Letters of Intent were used early in the emergency to expedite production. Through use of this form of contract, the contractor could begin manufacturing the needed supplies before agreement had been reached on a definite price, or the full extent of the procurement determined. The slightly different letter contract form was authorized in May and June 1941, for the same purpose. On December 17, 1941, there was issued at my direction, P. & C. General Directive No. 88, which ordered the more extensive use of letter contracts "in the interest of expediting procurement." On January 16, 1942, revised let-

ter contract forms were issued, and on January 13, 1942, a letter purchase order (to replace the letter of intent) was issued and its use directed by contracting officers "where the necessity for the supplies is so urgent as to render prior negotiations in respect to price, schedule of deliveries, or other terms impracticable, or where negotiations in respect thereto have failed to result in an agreement" (P. & C. General Directive No. 5). These policies were emphasized to the contracting personnel by the various supply arms [154] and services. For instance, the Signal Corps directed (April 20, 1942) that in no case in which time was of the essence should the selection of a satisfactory contractor be delayed to await agreement on the price; "if immediate agreement cannot be reached on the price, a letter purchase order or a letter of intent should be issued to the contractor selected, so that production can be initiated pending the negotiation of price." Pursuant to these directions, these contract forms were used in great number throughout the War Department.

19. Contractual devices were also adopted in an attempt to overcome the insistence of contractors on covering all the contingencies of wartime production into their prices.

a. One means, of course, of eliminating the probability of excessive profits and of tying the contract price to actual costs is the cost-plus-fixed-fee form of contract. The Act of July 2, 1940, authorized the use of this form, and War Department directives of the same day permitted its use when "deemed necessary in the interest of the United States in order to accomplish or expedite the national defense program." But this form of contract has never been favored by the War Department, for the

reasons that it offers no financial incentive to control or reduce costs and that it requires an inordinate amount of auditing and paper work. However, its use was found necessary in some cases. P. & C. General Directive No. 81, dated December 17, 1941, provided that "contracts will be negotiated on a cost-plus-a-fixed-fee basis only when the use of that form of contract is essential." Later directives have continued and strengthened that policy and have consistently urged the conversion of cost-plus-fixed-fee contracts to the fixed-price basis. [155]

b. Another attempt to meet the objections of suppliers who felt that they could not quote firm prices because of anticipated rises in material and labor costs, were escalator—price adjustment clauses. On September 17, 1941, the War Department approved a price adjustment (escalator) article to be used "only in exceptional cases where the facts justify their use." (P. & C. General Directive No. 48.) It was expressly required that all contracts containing the escalator clause also include an article providing for termination of the contract for the convenience of the Government. On December 17, 1941, P. & C. General Directive No. 86 issued certain amendments, mainly concerning indirect labor and material costs, to the approved clauses. Copies of these two directives (including the escalator clauses) are attached hereto as Exhibits C and D. Escalator clauses present some of the undesirable features of cost-plus contracts. Their administration is complex, and they require extensive accounting and auditing.

These devices were not favored by the War Department, for the reasons I have stated. By themselves, they were not satisfactory or effective methods for confining

profits to reasonable levels or for decreasing production costs. Other means of attaining these ends had to be developed.

Need for Renegotiation and Profit Limitation and
Measures to That End

20. At the beginning of the limited emergency in 1939, the only applicable statutory limits on profits from the sale of military or naval supplies were contained in the Vinson-Trammel Act of March 27, 1934, as amended (relating to naval vessels) and the Merchant Marine Act of 1936, as amended (relating to [156] construction of merchant ships). The Act of April 3, 1939, extended percentage profit limitation to cover Army aircraft contracts. The percentage of profit allowed to contractors was lowered to approximately 8% by the Act of June 28, 1940, but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, provided that as to aircraft the old limitation of 12% was to prevail.

21. Manufacturers of war products, particularly aircraft manufacturers, asserted that they could not take Government contracts in the face of these profit limitations. Many subcontractors were reluctant to work for them under Government prime contracts at 8% or 12% when they could make 15% or 20% working for civilian manufacturers. Moreover, many subcontractors were unwilling to take contracts which involved the necessity of keeping elaborate cost records subject to Government audit. It was therefore decided that the Vinson Act would have to be suspended, and that an excess profits tax should be levied. Accordingly, the Second Revenue Act of 1940, containing the excess profits tax, suspended

the profit limitation statutes applicable to Army and Navy contracts entered into after December 31, 1939, or uncompleted on that date by contractors and subcontractors subject to the new excess profits tax. Thereafter, until the passage of the Sixth Supplemental National Defense Appropriation Act of 1942, the only statutory provisions concerning war or defense contracts were those of the excess profits tax.

22. From the beginning of 1942, officials of the War Department were aware that a necessary result of the unstable purchasing conditions of war procurement would be the accumulation by many contractors and [157] subcontractors of excessive profits which would not be siphoned off by the existing tax legislation. Publication of financial reports of war contractors for 1941 indicated the tremendously increased profits derived from the more limited defense program. The decision of the Supreme Court in *United States v. Bethlehem Steel Corporation*, 315 U. S. 289, decided in February 1942, re-emphasized the extent of the profits which had been made in World War I. On March 23, 1942, the Naval Affairs Committee of the House of Representatives conducted a hearing on the defense profits of Jack & Heintz, Inc. (Hearings before the Committee on Naval Affairs, House of Representatives, 77th Cong., 2d Session, pursuant to H Res. 162, Vol. 1), and the information divulged at that hearing on the exorbitant profits made by that concern received wide publicity. Other information of the same character was developed by the Naval Affairs and other Congressional Committees and was made available to the War Department. The War Department and at least one of the supply services (the Signal Corps) es-

tablished rudimentary cost analysis units to study the manufacturing cost, of Army suppliers, and preparations were made to review and check contract prices.

23. The need for eliminating excessive profits obtained from war production is as paramount as it is obvious. Excessive profits mean increased tax and war loan burdens on the public and increased pressure toward inflation. Undue profit margins are also a cushion for wasteful and costly manufacture. Perhaps most important is the destructive effect of excessive war profits upon the morale of men in the armed services and of civilian workers. The sharp reaction to war profits which occurred after World War I is eloquent testimony of the significance of this factor. [158]

Voluntary Renegotiation

24. During the defense period, prior to December 7, 1941, there had been a certain number of voluntary refunds and price reductions by defense contractors. In June and July, 1941, War Supplies, Ltd., the Canadian Government corporation through which the United States purchases in Canada, agreed to refund to the War Department all profits over 10% of cost. In October 1941, it was found advisable to issue a directive on the taxable character of sums received by contractors but voluntarily refunded to the United States. P. & C. General Directive No. 54, October 7, 1941, stated that: "From time to time a contractor with the Government discovers that his profits are larger than he had at first estimated, and desires to refund the excess to the United States. Under these circumstances, certain contractors have hesitated least in making the refund they subject themselves to a tax penalty, either through paying or having paid income

taxes on the profits received or through being forced to pay a gift tax on any refund." But voluntary renegotiation took on much greater scope in early 1942.

25. On the same day that they appeared before the Naval Affairs Committee (March 23, 1942), officials of Jack & Heintz, Inc. met with procurement officials of the War Department for the purpose of reviewing the Company's Army contracts. It was agreed that the contractor would reduce its prices on its various contracts, totaling somewhat over \$50,000,000, by an over-all amount slightly in excess of \$10,000,000. On March 28, 1942, our procurement officials met with officials of Continental Motors Corporation to review that company's aircraft contracts. After negotiations, the company voluntarily agreed to reduce its prices on existing contracts by a total of \$40,000,000. A third [159] such meeting, on April 6th, with the Sperry Corporation resulted in a voluntary reduction of about \$100,000,000.

26. Other voluntary renegotiations were effected in the first quarter of 1942. A number of contractors expressed their willingness to adjust their prices to reflect actual costs, as they developed, and to restrict their profits to proper wartime levels.

a. Prior to May, 1942, General Motors Corporation had made voluntary price reductions running into more than \$200,000,000, according to its own figures. One example follows: In a contract made in August 1941 for 8,000 aircraft engines, the Allison Division of General Motors included contingency reserves in the unit prices but stated that if excessive profits developed during the course of performance it would be willing to grant reductions on undelivered engines. In December 1941 and

January 1942, the War Department received information that costs were lower than anticipated. Renegotiation discussions were begun with the contractor, and on March 30, 1942, it offered to refund approximately \$20,000,000 to the Government.

b. In June 1941, Republic Aviation Corporation undertook to manufacture 125 P-43A airplanes, over a period of some ten months, at a stated unit price. The Government's negotiators believed that the agreed price might lead to excessive profits. The contractor's representatives, though believing that the price was not too high, orally agreed that if profits in excess of 10 or 11 percent were made, the company would either voluntarily reduce its contract price or would construct an experimental plane for the Government without cost. On December 10, 1941 the contractor informed the Government that its profit on the contract would probably exceed the stipulated amount and [160] suggested that it furnish the experimental airplane. The War Department was not interested in the experimental airplane, and after further cost figures indicating excessive profits became available, the contractor offered an acceptable voluntary price reduction of \$1,445,370.00.

c. In April 1942, information became available that Beech Aircraft Corporation was making a profit of approximately 33% on its airplane contracts. On April 16th and 17th the Company agreed to review the contract prices, and shortly thereafter price reduction agreements were consummated.

d. Similarly, in April 1942 discussions were begun with Cessna Aircraft Corporation, Bendix Aviation Corpora-

tion, and some other contractors, which resulted in price reductions.

27. In March 1942, the War Department determined to establish formal price renegotiation machinery, and plans were drawn for a Price Adjustment Board to negotiate with contractors for reduced prices where excessive profits had been or were likely to be secured. On March 27, 1942 there was prepared in the War Department a tentative memorandum outlining the policy and procedure of the putative War Department Price Adjustment Board. The purpose of the Board, its operating policies, and method of operations were set forth, as well as a list of factors to be considered in determining the reasonableness of profits. A copy of this memorandum is attached as Exhibit E. To be noted is the similarity between the factors listed as governing profits reasonableness in this memorandum, in the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, dated March 1943, and in the Renegotiation Act, as amended and reenacted in the Revenue Act of 1943. This memorandum of March 27th was not published nor was it [161] issued officially, but use was made of it in voluntary renegotiations conducted by the War Department. At the meeting of March 28th with Continental Motors Corporation (see paragraph 25 above) this memorandum was read to the contractor's representatives as a preliminary and tentative statement of War Department policy on excessive profits.

28. Title XIII of the Second War Powers Act, enacted March 27, 1942, conferred upon the Government authority to inspect the plants, books, and records of war contractors. On April 10th, the President issued Execu-

tive Order 9127 ("Designating the Departments and Agencies to Inspect the Plants and Audit the Books and Records of Defense Contractors under Title XIII of the Second War Powers Act, 1942") in order "to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation." Under this order, the cost analysis units in the War Department were expanded and strengthened, and a new basis was laid for price adjustment boards.

29. The Under Secretary of War, the Under Secretary of the Navy and the Chairman of the Maritime Commission (with the approval of the Chairman of the War Production Board) agreed to establish price adjustment boards within the three agencies in order to advise and assist procurement officials "in securing adjustments or refunds in instances where it is determined that costs or profits of contractors are, or may be, excessive for any reason." A copy of this memorandum is attached as Exhibit F. Plans for such a board in the War Department had been proceeding meanwhile and on April 25th, Lieutenant General Brehon Somervell, Commanding General of the Services of Supply, formally established such a price [162] adjustment board, with my approval. A copy of his memorandum is attached as Exhibit G.

30. A corollary to the establishment of these procedures for voluntary renegotiation, without specific contractual or statutory basis, was the development of contract clauses looking toward the renegotiation or re-determination of prices after partial or complete performance. The problem was submitted to a committee of representatives of the War Production Board, the War De-

partment and the Navy Department and resulted in the preparation of two contract clauses. One, known as the "redetermination clause," was designed to permit automatic adjustment downward in price on the basis of actual cost experience during a "test run" early in the performance of the contract. The other contract provision, originally known as the "renegotiation clause," was designed to permit adjustment of the price either upward or downward in the light of actual cost experience after part performance, as soon as reasonably reliable cost estimates were feasible. These articles were promulgated for us in War Department contracts by P. B. General Directive No. 31, dated March 13, 1942, a copy of which is attached as Exhibit H. One of the purposes of the new clauses can be gained from the opening statement of the directive that "It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts."

Statutory Proposals

31. The Congress was, of course, also concerned with the probability that excessive profits would be made by many war contractors, despite the excess [163] profits tax. The disclosures at committee hearings and the profit information available was thought to require legislative action. In March 1942, a bill was introduced to establish a rigid profit limitation of 6% on war contracts. On behalf of the War Department, I opposed this proposal before the Committee on Naval Affairs of the House of Representatives (March 19, 1942), and Mr. Donald Nelson opposed it on behalf of the War Production Board

(March 24, 1942). (Hearings before the Committee on Naval Affairs, House of Representatives, 77th cong., 2nd Session, on H. R. 6790, pp. 2473-2475, 2577-2578.) Mr. Nelson and I pointed out that the bill, if enacted, was likely to interfere with war production, especially by delaying the conversion of small business to war work and also by forcing the increased use of the cumbersome and wasteful cost-plus-a-fixed-fee contract. We also pointed out that a fair percentage of profit was not solely a function of the cost of performance but depended upon such factors as turn-over, volume of business, amount of invested capital, financial structure, time of performance, and contribution to increased efficiency. Depending upon these factors, and particularly upon dollar volume of business, a 6% profit might be far too large or far too small. Attention was also called to the impossibility, under the flat percentage system, of allowing the recoupment of losses. At the same time, I stressed to the Committee that the War Department recognized its "plain duty to take every practicable step to prevent contractors from obtaining excessive and unconscionable profits," and I described the cost analysis and price adjustment projects which were then being formulated (see pars. 27-29 above), and the price redetermination and re- [164] vision clauses which had been authorized (see par. 30 above). This profit limitation bill, to which I expressed the War Department's opposition, was not acted upon by the House of Representatives.

32. On March 28, 1942, Congressman Case offered on the floor of the House of Representatives two profit-limitation amendments to the Sixth Supplemental National Defense Appropriation Bill. His first proposal was that

no final payment on a war contract be made by the Government "until the contractor shall have filed with the procuring agency a certificate of costs and an agreement for renegotiation and reimbursement satisfactory to the Secretary of War or the Secretary of the Navy, as the case may be." This amendment was subject to a point of order, and Congressman Case then offered a substitute amendment providing that final payment was not to be made "to any contractor who fails to file with the procuring agency a certificate of cost and an agreement for renegotiation of contract and reimbursement of profits in excess of 6 per cent." This amendment was adopted by the House of Representatives without debate. Mr. Case has stated that his proposals were modeled, in part, upon the renegotiation clauses developed by the procurement agencies (see par. 30 above). See Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 2nd Sess. on H. R. 6868, pp. 89-92, 211-2.

33. At a hearing held on March 31 and April 1, 1942, by a subcommittee of the Senate Committee on Appropriations, on the Sixth Supplemental National Defense Appropriations Bill for 1942, representatives of the Government stated the objections to the Case amendment, as it then stood. General Somervell reviewed the factors making adequate pricing impossible [165] in many cases and described the price adjustment procedures which had already been established in the War Department. The committee was informed that a Cost Analysis Section and a Price Adjustment Board had been set up and were at work and tentative policies and procedures had been laid down (Hearings pp. 24-25). The approved "redetermina-

tion" and "renegotiation" contract articles were also described to this subcommittee and their use explained. General Somervell, Mr. Donald Nelson of the War Production Board, and other representatives of the procurement agencies again stated the objections to an inelastic profit-limitation provision of the type of the Case amendment. It was pointed out that the amount and rate of profit should depend—out of fairness to contractors and to furnish the proper incentive to reduce costs—on a number of factors, such as rapidity of turn-over, development costs, production time, money invested in the business, risks incurred, efficiency of production; a flat percentage limitation lumping all contractors together would not only be unfair to many and too generous to others but is subject to the very defects which have placed the cost-plus contract in disfavor; moreover, the statutory percentage of profit which is intended to be a maximum tends to become a minimum and contractors believe that they are entitled to receive that rate of profit.

34. The Senate Subcommittee requested the procurement agencies to supply a substitute for the Case amendment. On April 2, 1942, General Somervell submitted a proposal on behalf of the War and Navy Departments and the War Production Board. A copy of this substitute proposal is attached as Exhibit I. The suggestion was based on the theory that if [166] every contract price could be reexamined by the parties in the light of actual experience under the contract, it should be possible to eliminate the bulk of excessive profits. Section 403, as finally enacted, differs in many respects from our proposal, but it retains the central principle that a fixed percentage limitation on profits should not be established.

35. The War Department has consistently opposed the substitution of a 100% excess profits tax in place of the renegotiation statute, for the same reasons for which we disapprove a flat percentage limitation on profits from war contracts. Our views are stated at length in the report of the Hearings before a Subcommittee of the Senate Committee on Finance on Section 403 of Public Law No. 528, September 29-30, 1942, 77th Congress, 2d Session, and the Hearings before the Committee on Naval Affairs, House of Representatives, pursuant to H. Res. 30, June 1943, 78th Cong., 1st Sess. pp. 997-1000. The Introductions to the Renegotiation Regulations of the War Contracts Price Adjustment Board and to the Joint Renegotiation Manual approved by the Joint Price Adjustment Board also contain statements on this point with which the War Department is in accord. In brief, the major objection to a 100% excess profits tax is that it would remove all incentive to reduce costs or promote efficiency, and in this respect would tend to increase the cost of war procurement through the waste of manpower and resources so as to counterbalance any gain in tax collections.

36. The War Department has found that the Renegotiation Act is the most satisfactory and effective method of eliminating excess profits on war contracts. The Department has vigorously opposed the repeal of the statute. [167]

Contracts on Which Final Payment Had Not Been Made on April 28, 1942

37. At the end of April 1942, the following amounts were obligated for contracts, but unexpended, by the Navy Department and the three major procurement services of the War Department:

Army Air Forces contracts, over.....	\$16,700,000,000
Ordinance Department contracts, over.....	10,000,000,000
Engineers contracts, over.....	4,000,000,000
Navy contracts, over.....	18,000,000,000
<hr/>	
Total, over.....	48,700,000,000

These figures concern only the agencies listed; they do not include subcontracts; nor do they include sums actually paid prior to April 28, 1942, on contracts on which final payment was not made until after that date. The figures do, however, include sums owing on some contracts exempt from renegotiation under the statute, but such sums are relatively small.

38. On the whole, it is certain that, on April 28, 1942, there were outstanding uncompleted war contracts in a total figure considerably in excess of 50 billion dollars which would have been exempt from renegotiation if the statute had not been made applicable to contracts existing on April 28th but with respect to which final payment had not been made by that date.

39. It is impossible to give more than the most general data concerning the life of the uncompleted contracts in existence on April 28, 1942. The average time required for the construction of the major types of projects (cantonments, airfields, ordnance plants) being constructed

under the supervision of the Corps of Engineers in April 1942 was from 7 to 18 months. A substantial proportion of the Ordnance contracts placed during the first four months of 1942 extended for over six months; some of these contracts con- [168] templated production extending over a period as long as two years. The Navy Department estimates that at least one-third of its funds which were obligated but unexpended on April 30, 1942, represented contracts requiring 12 months or longer for performance.

Excessive Profits Eliminated By Renegotiation

40. As of September 19, 1944, 34,966 contractors had been assigned for renegotiation with respect to fiscal years ending during the calendar year 1942. As of the same date, 35,200 contractors had been assigned for such renegotiation with respect to fiscal years ending during the calendar year 1943. Of the cases assigned with respect to fiscal years ending in the calendar year 1942, relatively few remain uncompleted; and the renegotiation agencies are well along toward completion of the cases assigned with respect to fiscal years ending in the calendar year 1943.

41. As of September 22, 1944, in 7,949 cases excessive profits had been determined by agreement between the contractor and the Government, and at that date in 207 cases excessive profits had been determined by unilateral action by the Government without the agreement of the contractor. Thus, 97.5% of the cases in which excessive profits had been determined involved bilateral agreements in which the contractor joined. These figures do not include the cases, of which there are a large number, in

which no excessive profits were found or in which the renegotiation proceedings were cancelled as the result of information indicating no excessive profits. It should be noted, too, that the number of contractors affected by the bilateral agreements exceeds the number of 7,949, since many of these agreements affect groups of parent and subsidiary corporations. [169]

42. It is impossible at the present time to give complete figures as to the dollar volume of the sales covered by the cases in which excessive profits have been determined. As of September 16, 1944, in the 7,733 cases concluded by bilateral agreement or unilateral determination (excluding Army construction contracts), the aggregate renegotiable sales of the contractors affected (prior to adjustment for excessive profits eliminated) were \$30,975,405,000. Excessive profits eliminated in these cases amounted to \$3,586,652,000. In addition, approximately \$57,000,000 in excessive profits had been recovered from construction contractors assigned to the Chief of Engineers for renegotiation. These figures do not take account for reductions in Federal taxes occasioned by the elimination of excessive profits through renegotiation.

43. The figures in the preceding paragraph do not include excessive profits eliminated (a) by refunds made to contracting officers prior to and unrelated to statutory renegotiation, (b) by reduced prices with respect to future performance or deliveries under existing contracts, or (c) by reduced prices under new contracts. No statistical data are available as to the amounts of excessive profits so eliminated or prevented, but they have been substantial, and run into many hundred millions of dollars.

44. The data contained in paragraphs 40 to 43 cover renegotiations carried on by all agencies and not merely those in which the War Department is interested.

Renegotiation Procedure

45. From the very beginning of statutory renegotiation by the War Department, the attempt has always been made to secure the full cooperation of the contractor in the process of renegotiation. It has been [170] the uniform practice to explain the purposes, policies, and methods of renegotiation to contractors and to elicit their participation both in the furnishing of information and in the drawing up of an agreement as to excessive profits. Although Title XIII of the Second War Powers Act, 1942, grants the Government certain powers to secure the pertinent records and data, on which renegotiation must be based, from recalcitrant contractors, we have always sought to obtain this information voluntarily, and without unduly hampering the contractor's activities. Similarly, although the statute empowers the renegotiation agencies to determine excessive profits unilaterally, it has always been our policy to renegotiate, in the literal sense, and to seek a bilateral agreement with the contractor, whenever possible.

46. In most cases, renegotiation in the War Department (for fiscal years ended on or prior to June 30, 1943) was conducted initially by Price Adjustment Sections of the Technical Services (e.g., Ordnance Department, Signal Corps, Chemical Warfare Service) and the Army

Air Forces. If the initial renegotiation proceedings did not result in an agreement with the contractor, or if a bilateral agreement was proposed in cases where the contractor's gross sales were more than \$10,000,000, the case was always referred to the War Department Price Adjustment Board. I am advised that the Board, in every case in which a contractor requested a meeting with representatives of that Board, accorded the contractor that opportunity. Until April 12, 1945, if an agreement could not be reached between the representatives of the Board and the contractor, the case was then referred, together with a full report, to me as Under Secretary of War. It was my practice to refer such case, for initial review, to one of my principal assistants, not otherwise connected with renegotiation. This assistant invariably allowed the contractor, upon the latter's request, to meet with him before he made any [171] recommendation to me; and in this meeting the contractor could present any pertinent material not previously furnished and discuss the matter from the contractor's point of view. I personally made the final determination that excessive profits had been made in every case in which a unilateral determination was signed by me. The last hearing conducted by an assistant of mine under this procedure was held on April 12, 1945. On April 11, 1945, I delegated to the Chairman of the War Department Price Adjustment Board the power to make unilateral determinations under the Renegotiation Act. I am informed that, pursuant to that delegation, the War Department Price Adjustment Board has es-

established a Determination Committee consisting of the six War Department members of the Board. That Committee, as I am informed, has granted and will grant contractors an opportunity for a meeting with two members of the Committee, appointed by the Chairman for that purpose, before a final determination is made in any case where the Committee disapproves the determination recommended by the representatives of the Board who met with the contractor initially. In sum, opportunity is always afforded the contractor for discussions with representatives of the renegotiating agency and the presentation of pertinent data and argument. No unilateral determination has ever been made without the contractor's having been offered the opportunity, at some stage and in substantially all cases at several stages in the renegotiation process, to present his views and discuss the matter.

Robert P. Patterson

ROBERT P. PATTERSON.

Sworn to and subscribed before me this 3rd day of August, 1945.

[SEAL]

EDWARD L. DAVIS,

Notary Public, D. C.

My Commission Expires July 14, 1946. [172]

EXHIBIT A

W. P. B. RECORD OF MONTHLY AWARDS OF
PRIME WAR SUPPLY CONTRACTS

Date	Number of contracts				
	Total	Aircraft	Ships	Ordnance	All others
1941					
July.....	1,124	40	40	202	842
Aug.....	1,352	62	77	264	949
Sept.....	1,476	78	68	223	1,107
Oct.....	1,824	97	49	305	1,373
Nov.....	1,566	94	67	321	1,084
Dec.....	1,885	116	63	384	1,322

1942					
Jan.....	3,612	132	156	836	2,488
Feb.....	3,656	136	165	710	2,645
Mar.....	4,188	162	161	765	3,100
Apr.....	4,866	187	197	795	3,687
May.....	3,597	114	126	459	2,898
June.....	3,657	143	171	439	2,904

Value (millions of dollars)

1941					
July.....	1,057	92	129	551	285
Aug.....	1,842	688	237	636	281
Sept.....	1,335	386	159	436	353
Oct.....	2,404	1,264	107	569	464
Nov.....	1,506	261	288	461	495
Dec.....	3,131	985	406	1,150	589

1942					
Jan.....	9,456	2,435	2,092	4,015	914
Feb.....	7,301	3,628	893	1,891	889
Mar.....	5,343	1,440	728	1,842	1,333
Apr.....	5,715	1,234	1,014	1,808	1,659
May.....	4,843	1,337	759	1,530	1,216
June.....	5,299	937	1,249	1,709	1,404

EXHIBIT B

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
Washington, D. C.

January 14, 1942.

PC-E-400.13 (Procurement).

P. & C. General Directive No. 8.

Memorandum for: The Chief of the Air Corps.

The Chief, Chemical Warfare Service.

The Chief of Coast Artillery.

The Chief of Engineers.

The Chief, National Guard Bureau.

The Chief of Ordnance.

The Quartermaster General.

The Chief Signal Officer.

The Surgeon General.

Subject: Selection of contractors for war production.

1. The heavy procurement program and need for speed in production make vital the best utilization of every facility. As a limited number of facilities are able to undertake precision work, care must be exercised in allocating only such work to them, each plant to undertake the highest caliber of work its equipment can produce.

2. In awarding prime contracts, great weight must be placed upon the contractor's agreement to subcontract a high percentage wherever this is feasible. Unless secondary facilities are thus put to work on the simpler components, difficulty will later be encountered in placing prime contracts calling for precision work. The best

results will be obtained by insisting upon such subcontracting at the time of the award of [174] the prime contract as efforts to have prime contractors subcontract simpler components at a later date may be only partially successful after work has been started.

3. In many cases requirement of subcontracting will add to the total cost. Price is a secondary consideration as compared with speed and efficient production. Reasonable increase in price which will speed the program through subcontracting is justified. Because of the increase in price, subcontracting should be taken into account in making the award and should be provided for in the prime contract, where possible, rather than to assume that it can be arranged after the award has been made.

4. Speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. Accordingly, under our present decentralized procurement policy the chiefs of the supply arms and services and their district procurement offices must exercise their best judgment in the matters mentioned in paragraphs 1, 2 and 3 above. War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field.

By direction of the Under Secretary of War:

(S) JOHN W. N. SCHULZ,
Brigadier General, U. S. Army,
Director of Purchases and Contracts. [175]

EXHIBIT C

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
Washington, D. C.

September 17, 1941.

PC-L 162 (Escalator Clause).

P. & C. General Directive No. 48.

Memorandum for The Chief of the Air Corps.

The Chief, Chemical Warfare Service.

The Chief of Coast Artillery.

The Chief of Engineers.

The Chief, National Guard Bureau.

The Chief of Ordnance.

The Quartermaster General.

The Chief Signal Officer.

The Surgeon General.

Subject: Price Adjustment Clause

1. Price Adjustment articles (escalator clauses) will be included in supply contracts only in exceptional cases where the facts justify their use. In determining the justification for the inclusion of such a clause, the following factors, among others, should be given consideration:

a. The inclusion of an escalator clause should result in a lower contract price than if such a clause were not included. Before consenting to the inclusion of an escalator clause in a contract, the contracting officer should satisfy himself that the contractor has not included in the contract price any amount to cover probable increased direct labor or direct materials costs.

b. The time required for the performance of the contract should be such as to make it im- [176]

possible to forecast with reasonable accuracy the extent of changes in the direct labor or direct materials cost under the contract. Ordinarily the time of performance should not be less than six (6) months.

c. The contract should be of sufficient amount to warrant the administrative expenses which would be incurred in administering the escalator clause. As a general rule, contracts for less than \$100,000 would not warrant such expenditure.

2. Attached hereto are copies of the Price Adjustment article (escalator clause) as approved by the Under Secretary of War on September 13, 1941, for use in supply contracts hereafter entered into where it has been determined that an escalator clause should be included. Any deviations from this form will be made only after approval in each case by the Under Secretary of War. Requests for such approval will be accompanied by a detailed statement of the facts and reasons justifying such deviation.

3. All contracts containing this escalator clause will also contain an article providing for termination of the contract for the convenience of the Government.

4. It is desired that the foregoing instructions be communicated promptly to all contracting agencies in your branch.

By direction of the Under Secretary of War:

(S) JOHN W. N. SCHULZ,

John W. N. Schutz,

Brigadier General, U. S. Army,

Director of Purchases and Contracts.

Incls.

cys. Price Adjustment Clause. [177]

FORM OF ESCALATOR CLAUSE APPROVED BY
THE UNDER SECRETARY OF WAR,
SEPTEMBER 13, 1941

Article..... *Price Adjustments.*

The total contract price stated in Article..... is subject to adjustment for increases or decreases in direct labor and direct material costs in accordance with the following method:

(a) Labor.

(1) Upon the basis of labor costs prevailing in, 194.... (hereinafter called the base month) the direct labor cost is estimated to be \$..... Direct labor, as used herein, refers only to the labor of employees of the Contractor performed directly on, and properly chargeable to, the supplies manufactured hereunder, excluding, but without limitation, all executive managerial, supervisory, technical, professional, office, clerical and sales employees, but including working foremen, gangbosses and strawbosses. The Contractor represents that the above estimated cost is based upon a schedule, approved by the Contracting Officer, of the kinds or classes of jobs or occupations to be charged as direct labor under this contract, and that the estimate includes only such jobs or occupations. In computing the actual direct labor cost for the purposes of paragraph (a) (2) and (a) (3) hereof, the cost of kinds or classes of jobs or occupations not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the estimated direct labor cost set forth above shall be apportioned into direct labor cost quotas for the

consecutive three-month periods (hereinafter called "quota periods") beginning on the first [178] day of 194....,¹ and on the first day of each third month thereafter. This apportionment shall be made by dividing the actual direct labor cost properly charged to this contract during each quota period by the total actual direct labor cost under the contract, and by multiplying the percentage thus obtained for each quota period by the total estimated direct labor cost. The result shall be the direct labor cost quota for that period.

(3) Upon the basis of the average hourly earnings in the durable goods manufacturing industries compiled by the United States Department of Labor, Bureau of Labor Statistics, the Government will determine the average hourly earning for each quota period by adding the average hourly earnings for each month of such quota period and dividing their sum by three, and calculations will be made of the percentage of change of such average hourly earnings for each quota period in comparison with the average hourly earnings for the base month. The labor cost quota for each quota period will then be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; *Provided*, That the total of such increases in the contract price shall not exceed the amount by which the total actual direct labor cost exceeds the total estimated direct labor cost, and that the total of such decreases in the contract price shall not exceed the amount by which the total actual direct labor cost is less than the total estimated direct labor cost.

¹The month during which the contracts is executed or performance is commenced, whichever is earlier.

(b) Materials. [179]

(1) Upon the basis of materials costs prevailing in the base month, the cost of direct materials which the Contractor will purchase for the performance of this contract, excluding materials to be used which the Contractor has on hand or for which firm price commitments have been obtained by him (hereinafter call "direct materials to be purchased hereunder"), is estimated to be \$..... (hereinafter called "estimated adjustable materials cost"). Direct materials as used herein refers only to those materials which go into and become a component part of the Contractor's finished product and which, under the cost accounting system regularly employed in the Contractor's plant, are accounted for by direct charges to the particular contract. The Contractor represents that the above estimate is based upon a schedule, approved by the Contracting Officer, of the kinds and classes of "direct materials to be purchased hereunder." In computing the actual cost of "direct materials to be purchased hereunder" for the purposes of paragraphs (b) (2) and (b) (3) hereof, the cost of kinds or classes of materials not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the "estimated adjustable materials cost" shall be apportioned into materials cost quotas for the quota periods as defined in paragraph (a) (2) above. This apportionment shall be made by dividing the total actual cost of "direct materials to be purchased hereunder" into the portion of such cost properly charged to the contract during each quota period, and by multiplying the percentage thus obtained for each quota period, by the total

"estimated adjustable materials cost." The result shall be the materials cost quota for that period. Direct materials shall be [180] charged to the contract for the quota period during which the price therefor is determined as between the Contractor and the materials supplier; *Provided*, That where commitments are obtained by the Contractor for future deliveries at a firm price in excess of the market price prevailing at the time such commitments were obtained, such materials shall be charged to the contract for the quota period during which delivery is to be received by the Contractor; *And, Provided further*, That with respect to materials which are not identifiable with the purchase commitments under which they are acquired, determinations as to (1) whether the materials employed in the performance of this contract were on hand at the time the contract was executed, and (2) the quota period to which the materials are to be charged and the amount of such charge shall, with the approval of the Contracting Officer, be made on the basis of the accounting system regularly employed in the Contractor's plant.

(3) The Government will average for each quota period the index numbers of wholesale prices for² compiled by the United States Department of Labor, Bureau of Labor Statistics for the three months included within such quota period, and calculations will be made of the percentage of change of such average index numbers for each quota period in comparison with the index numbers for the base month. The materials cost quota for each quota period shall then

²The index for the commodities group which includes the items making up the major portion of the "direct materials to be purchased hereunder."

be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; *Provided*, That the total of such increases in [181] the contract price shall not exceed the amount by which the actual cost of "direct materials to be purchased hereunder" exceeds the total "estimated adjustable materials cost," and that the total of such decreases in the contract price shall not exceed the amount by which said total actual cost of "direct materials to be purchased hereunder" is less than the total "estimated adjustable materials cost."

(c) General.

(1) For the purpose of determining increases or decreases in contract prices, rates of change in average hourly earnings and rates of change in the materials index number will be calculated to the nearest one-tenth of one percent, and there shall be used the latest figures which shall have been issued by the Bureau of Labor Statistics up to the close of the fourth month following the last quota period under this contract.

(2) Payments for increases, or deductions for decreases in the contract price, resulting from the operation of this article, will be made after the completion of the calculations of price adjustments in accordance herewith; *Provided*, That the Government may, from time to time during the life of the contract, make partial payments on account of such increases, subject to such requirements as a condition precedent to such payments as the Contracting Officer may provide; *Provided, further*, That in this event such partial payments shall exceed the amount due to the Contractor by the operation of this article, the

Government shall deduct the amount of such excess from any further payments due under this contract.

(3) Should the Contractor, during the performance of this contract, on account of subcontracting, or otherwise, depart from the production methods upon which the estimates and schedules of direct labor and direct [182] materials costs were based to such an extent that the use of such estimates or schedules will operate to produce an unfair adjustment of the contract price, a corresponding correction in such estimates or schedules may be made by mutual agreement between the Contractor and the Contracting Officer. In the event of disagreement with respect to the need for or extent of such correction, the procedure of Article 12 (Disputes) shall apply.

(4) If this contract is terminated pursuant to any provision thereof the contract price shall be adjusted as provided above, except that for the purposes of paragraphs (a)(2), (a)(3), (b)(2), and (b)(3), the terms "estimated direct labor cost" and "estimated adjustable materials cost" shall be understood to refer to that part of such costs which corresponds to that proportion of the supplies contracted for which is completed and delivered by the Contractor, and the terms "actual direct labor cost" and "actual cost of direct materials to be purchased hereunder," shall refer only to that part of such costs which is properly chargeable to the supplies completed and delivered.

(5) The Contractor shall file with the Contracting Officer, not later than sixty days after the completion of the performance of the work under this contract or after its termination, a statement of the actual direct labor costs and the actual costs of "direct materials to be pur-

chased hereunder," certified as correct by an independent public accountant approved by the Contracting Officer, showing the amounts of such costs properly chargeable during each quota period and, in case of termination, the amounts properly chargeable to the supplies completed and delivered. In determining the total actual direct labor cost and the total [183] actual "direct materials to be purchased hereunder," and in determining the amounts thereof to be charged in each quota period, the Contractor may, subject to the approval of the Contracting Officer and to the limitations of paragraph (b) (2), employ the accounting system regularly employed in the Contractor's plant. Such statement shall be deemed prima facie correct. The Government reserves the right to audit the books and records of the Contractor, to determine the accuracy of such determinations and certification, and to obtain any information in connection with the operation of this Article. All information obtained from the Contractor's records shall be treated as confidential. The Contractor shall preserve all the books, papers, and other accounting records pertaining thereto; *Provided*, that if the Contractor at any time after the lapse of three years following the completion or cessation of work under the contract, desires to dispose of said books, papers, and accounting records, he shall so notify the Secretary of War, or his duly authorized representative, who shall either authorize their destruction or notify the Contractor to turn them over to the Government for disposition. [184]

EXHIBIT D

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
Washington, D. C.

PC-L 162.

December 17, 1941.

P. & C. General Directive No. 86.

Memorandum for: The Chief of the Air Corps.
The Chief, Chemical Warfare Service.
The Chief of Coast Artillery.
The Chief of Engineers.
The Chief, National Guard Bureau.
The Chief of Ordnance.
The Quartermaster General.
The Chief Signal Officer.
The Surgeon General.

Copy to: The Judge Advocate General—for information.

Subject: Amendment to Price Adjustment Clause.

1. Reference is made to the form of escalator clause approved by the Under Secretary of War on September 13, 1941, accompanying P. & C. General Directive No. 48.

2. It has been determined that the escalator clause should be amended so as to provide for adjustments on account of changes in pay-roll taxes, and therefore, the approved form of escalator clause will be amended by adding the following provision thereto as paragraph (c) (6):

If after the date on which the prices herein were quoted, the Congress or any state legislature, shall impose, remove, increase or decrease any pay-roll tax required to be borne by the [185] contractor and

directly applicable to or measured by the pay-rolls of the contractor hereunder, then the rate of such newly imposed tax, or the net increase or net decrease in the rate of a previously imposed tax, shall be multiplied by that portion of the actual direct labor cost which is subject to such increases or decreases in the tax or taxes, and the result shall be paid the contractor under this paragraph.

3. It has also been determined that the escalator clause should be amended so as to provide for adjustment on account of changes in indirect labor and indirect material costs. Accordingly, the following amendments to the approved form of escalator clause will be made:

a. As a second sentence to Paragraph (a) (1), add the following:

"It is also estimated that the indirect labor cost attributable to this contract is% of such estimated direct labor cost."

b. Add the following as Paragraph (a) (4):

"The total increase or decrease to be paid or deducted under Paragraph (a) (3) shall be multiplied by%¹ and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect labor cost under this contract."

c. Add the following as the second sentence in Paragraph (b) (1):

¹The percentage of indirect labor cost stated in Paragraph (a) (1).

"It is also estimated that the indirect materials cost attributable to this contract is% of such estimated direct materials cost."

d. Add the following as Paragraph (b) (4):

"The total increase or decrease to be paid or deducted under Paragraph (b) (3) shall be [186] multiplied by%² and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect materials cost under this contract."

4. In negotiating the estimated direct labor cost, the percentage thereof represented by indirect labor cost, the estimated direct material cost, and the percentage thereof represented by indirect material cost, the Contracting Officer should consider, among other things, the following factors:

a. The amount of the estimated direct labor cost and the amount of the estimated direct materials cost should be limited in accordance with the definitions of direct labor and direct material costs contained in paragraphs (a) (1) and (b) (1) of the escalator clause, and should not include any amounts for indirect labor or indirect material costs;

b. The total of the estimated direct labor cost and the estimated direct material cost together with the amounts obtained by the application of the percentages set forth for indirect labor and indirect materials, should bear a reasonable relation to the total contract

²The percentage of indirect materials cost stated in Paragraph (b) (1).

price. In any case where the difference between the total of these amounts and the contract price does not leave a reasonable margin to cover profit, rent, depreciation, taxes, and similar costs not included in the labor or material costs factors, it will be apparent that the estimates are too high, and should be accordingly reduced.

By direction of the Under Secretary of War:

(S) JOHN W. N. SCHULZ,
Brigadier General, U. S. Army,
Director of Purchases and Contracts. [187]

EXHIBIT E

WAR DEPARTMENT PRICE ADJUSTMENT BOARD Policy and Procedure

Purpose of the Board.

The Price Adjustment Board will serve as a focal point for the review of contracts existing between the War Department and its contractors. Its duties will be to make sure that the War Department is doing an economical job of purchasing and that contractors are not making excess or unreasonable profits on war orders. In its review of contractor profits the Board will endeavor to eliminate from contractor cost calculations exhorbitant items of whatever nature.

The Board will assist the Services in securing an adjustment in contract prices that will accomplish the foregoing objectives.

The Board will also serve contractors who feel that their contract prices are such that a likelihood exists that

they will make excessive or unreasonable profits. It will invite war contractors finding themselves in this position to consult with it for the purpose of arriving at a fair and equitable voluntary adjustment.

Operating Policies.

The following principles will be observed by the Price Adjustment Board in dealings with contractors:

1. The Board will endeavor to arrange for a re-adjustment in contract price or to obtain a return of payments made pursuant to a contract to the extent which will result in limiting the contractor to a fair and reasonable profit.

2. In judging the reasonableness of profit, the Board will consider: [188]

- (a) the total profit made by the contractor before allowance for federal income and excess profit tax.

- (b) the amount of profit per unit based on estimated or actual cost.

3. In determining the estimated or actual cost per unit of performance of the contract, the Board will give consideration to all items of cost, including the following:

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses

Total Factory Cost

- B. Other manufacturing cost
- C. Miscellaneous direct expenses
- D. Indirect engineering expenses
- E. Expenses of distribution, servicing and administration
- F. Guarantee expenses

4. The Board will in general be guided by the cost accounting system regularly utilized by the contractor, except that the Board will, in appropriate cases, disallow salaries, bonuses or other expenditures which are clearly excessive.

5. In determining the amount of profit to be viewed as reasonable, the Board will give proper consideration the following:

A. The first factor in determining the attitude of the Board toward the contractor will be based on the contribution that the contractor has made [189] and is making to the completion of the war production program.

B. Whether the contract is performed in whole or in part with facilities furnished by or financed by the Government.

C. The amount of invested capital employed by the contractor in the performance of the contract.

D. The ratio between this investment and sales volume.

E. The period of time required to perform the contract.

F. The complexity or simplicity of the manufacturing operations involved.

G. The presence or absence of exceptional risks to be borne by the company.

H. The degree of skill and management and organization required of the contractor. In this connection special attention will be paid to the extent to which the Government has been called upon to arrange for furnishing "know-how" to the contractor.

I. The contribution that the contractor has made to the technical improvement and development of war matériel and production methods.

J. Special consideration will be given those contractors who have assisted other producers in performing a better job.

6. In cases where performance has been substantially or wholly completed, consideration will be given to the extent to which the contractor has met or anticipated delivery schedules.

7. The Board shall not be limited to the foregoing factors but may give consideration to any other factors which in its judgment are reasonably applicable. [190]

Method of Operation.

Information as to concerns making unreasonable profits or those paying excessive salaries or bonuses, or setting up excessive reserves, etc., will be obtained by the Board from the services, Division of Budget & Financial Administration, Contract Clearance Branch of the War Production Board, or any other sources.

All costs analyses are to be prepared by the Division of Budget and Financial Administration.

When the contractor is working for the Navy or the Maritime Commission as well as the Army, that department which has been assigned to the contractor will take charge of the case.

The Price Adjustment Board function will be completed when an agreement is arrived at with the contractor setting a limiting figure that shall be considered a reasonable profit before federal income and excess profit taxes. From this point forward, it is contemplated that the contractor will renegotiate contracts with the Service or Services involved so as to bring its total profit down to the agreed upon figure.

EXHIBIT F

Memorandum

Pursuant to Executive Order No. 9127, dated April 8, 1942, and for the purpose of controlling profits and costs under war contracts through adjustments with contractors, there have been established with the War Production Board, the War Department, the Navy Department and the Maritime Commission cost analysis sections. Further to implement control of costs and profits on war contracts, the following procedures will be established:

1. The War Department and the Navy Department and the Maritime Commission will each [191] create a board to be known as the Price Adjustment Board of the War Department, the Navy Department, or the Maritime Commission, as the case may be, to advise and assist the official in such Department or Commission in charge of purchasing, in securing adjustments or refunds in instances where

it is determined that costs or profits of contractors are, or may be, excessive for any reason. Each board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Department or Commission which created it.

2. The Chairman of the War Production Board shall recommend a representative for appointment to each board. The Price Adjustment Boards may have one or more members in common.

3. The Cost Analysis Section of the War Production Board will conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, either upon the request of one of the Price Adjustment Boards, or of the Cost Analysis Section of any Department, or upon its own initiative.

4. The Cost Analysis Sections of the War Department, Navy Department and the Maritime Commission will act as fact finding agencies for the Price Adjustment Boards and will upon the request of any Price Adjustment Board conduct investigations into the cost and profits of any contracts in which Departments or the Commission are interested. Any such investigation made upon the request of a Price Adjustment Board will be in such form and in such detail and will include such subject matter as such Price Adjustment Board may require. The Departments and the Commission will cooperate with each other in [192] order to avoid duplicating investigations of common contractors.

5. All cost analysis reports and all information obtained from contractors or otherwise by the various Cost Analysis Sections including that of the War Production Board and all information and records of the various Price Adjustment Boards will be available at all times to each of the Price Adjustment Boards and to each of the Cost Analysis Sections.

6. The Cost Analysis Sections of the War Production Board and of the Departments and the Commission are authorized to make use of the facilities of the Treasury Department, Securities and Exchange Commission, Federal Trade Commission and other proper departments or agencies of the Government in securing and assembling information.

7. Each Price Adjustment Board may establish such policies and procedures for the administration of its proceedings as it may deem proper. Every effort shall be made to keep the procedure of each board simple and flexible. Each board shall keep a written record of each action taken by it. Each board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the board and to represent the board in negotiations with contractors.

8. Where contractors have contracts with both Departments or with one or both of the Departments and the Commission, the Price Adjustment Boards of the Department or Commission involved shall agree as to how and by whom the negotiations shall be conducted. [193]

9. No audit shall be made by any Department or the Commission pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board.

(Signed) ROBERT P. PATTERSON,
Under Secretary of War.

(Signed) FORRESTAL,
Under Secretary of Navy.

(Signed) E. S. LAND,
Chairman, Maritime Commission.

Approved:

(Signed) D. M. NELSON,
Chairman, War Production Board.

EXHIBIT G

WAR DEPARTMENT
Washington

April 25, 1942.

Memorandum for Directors of all Staff Divisions, Services of Supply.

Chiefs of All Supply Services.

Chief of Each Administrative Service.

Commanding Generals of All Corps Areas.

Subject: Price Adjustment Board, Services of Supply.

1. There is created within the Services of Supply a Price Adjustment Board.

2. The mission of the Price Adjustment Board shall be to advise and assist the Chief of the Purchase Branch,

Procurement and Distribution Division, in securing adjustments and refunds in cases where it is thought that costs or profits of War Department con- [194] tractors are or may be excessive by reason of the payment of excessive salaries or bonuses or for any reason.

3. The members of the Board will be selected by the Commanding General, Services of Supply, with the approval of the Under Secretary of War. One member will be selected with the approval of the Chairman of War Production Board, as his representative.

4. The Board is instructed wherever appropriate to function jointly with representatives or agencies of the Navy Department, Maritime Commission, and other Departments or agencies of the Government.

5. The Board will receive from the Cost Analysis Section of the War Production Board, the Cost Analysis Section of the Fiscal Division of the Services of Supply, the Supply Services, the Army Air Force, and from any other source, information with respect to contractors who are thought to have excessive costs, to be making excessive profits, or to be paying excessive salaries or bonuses.

6. (a) The Cost Analysis Section of the Fiscal Division of the Services of Supply shall upon request of the Board make such audits and analyses as may be designated by the Board and shall secure for the Board from the Treasury Department, the Securities and Exchange Commission, the Federal Trade Commission, and from any other Department or agency of the Government, or from

the contractor involved, such additional information as the Board may request in order to expedite and assist it in the performance of its functions.

(b) All Divisions and personnel of the Services of Supply and the Army Air Force shall furnish such information and assistance to the Board as it may request or as may appear desirable to aid it in the performance of its functions. [195]

(c) To effect full coordination between the Services of Supply, the Army Air Force, and other Departments and to insure a uniform policy, price reductions which are offered to or contemplated by, the Services of Supply and the Army Air Force will be referred to the Chief of the Purchases Branch.

7. The Board is authorized to delegate to any one or more of its members the power to initiate investigations and request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors. The Board shall develop such other policies and procedures as it may deem advisable in performing its functions and accomplishing its purposes.

8. The Board shall report to the Chief of the Purchases Branch, Procurement and Distribution Division, Services of Supply, its recommendations for adjustments with contractors. These recommendations, if approved by the Chief of the Purchases Branch and the Director or Deputy Director of the Procurement and Distribution Division, Services of Supply, shall be transmitted to the

Services concerned for the purpose of effecting any re-negotiation or revision of contracts required in order to carry out such recommendations.

(Sgd.) BREHON SOMERVELL,
Brehon Somervell,
Lieutenant General,
Commanding.

Approved: April 25, 1942.

(Sgd.) ROBERT P. PATTERSON,
Robert P. Patterson,
Under Secretary of War. [196]

EXHIBIT H
WAR DEPARTMENT
HEADQUARTERS, SERVICES OF SUPPLY
Washington

March 13, 1942.

SP-PB-ppp 300.4.

P. B. General Directive No. 31.

To: The Chief, Chemical Warfare Service.

Chief of Engineers.

Chief of Ordnance.

The Quartermaster General.

Chief Signal Officer.

The Surgeon General.

Commanding General, Transportation Division.

Commanding Generals, all Corps Areas.

Commanding Officers, General Depots.

Subject: Use of Price Renegotiation Clause in Fixed
Price Contracts.

1. It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts. In any case where in the opinion of the Contracting Officer it is desirable that the Contractor immediately commence production or preparation therefor, the Letter Purchase Order prescribed by P. & C. General Directive No. 5, dated January 13, 1942, may be issued pending such negotiation. Where actual production and delivery may occur prior to the execution of the contract, the words "partial payments and" or words of substantially similar import may be inserted in paragraph 4 of such Letter Purchase Order before the words "advance payments." [197]

2. Where a Letter Purchase Order is employed in accordance with paragraph 1 hereof, the contract should be negotiated at the earliest possible date even though final determination of price is impracticable at that time, and provision should be made in the contract for re-determination or renegotiation of the price, as authorized herein.

3. The Contracting Officer, in order to facilitate the execution of the contract and the commencement of work thereunder, may, pursuant to the authority of the First War Powers Act, 1941 (Public 354, 77th Cong.) and Executive Order #9001, insert in the contract and apply either of the following articles: (a) Redetermination of Price (Attachment 1), or (b) Renegotiation (Attachment 2).

4. It will be observed that Attachment 2 imposes upon the Contractor no legal obligation beyond that of furnishing a statement of actual costs and to renegotiate in good

faith. Such statement will afford a basis for renegotiation of the contract price. On the other hand, Attachment 1 calls for the application of definite objective standards, thereby making the redetermination of price largely automatic rather than dependent upon renegotiation.

(Sgd.) BREHON SOMERVELL,

Lieutenant General,

2 Incls: *Commanding.*

Attach. 1,

Attach. 2.

Approved by:

ROBERT P. PATTERSON,

Under Secretary of War.

Attachment No. 1.

Article *Redetermination of Price.*

The parties hereto recognize that, because of circumstances beyond their control, accurate estimates [198] of the cost of performing this contract cannot be made within a reasonable time. Accordingly, they agree that the price stated in Article 1 shall be redetermined as provided below, upon the basis of the actual experience of the Contractor in performing part of his contract. Such redetermination of the price shall be made as follows:

(a) The estimated cost of performing this contract, upon which the price stated in Article 1 is based, is \$....., itemized as follows:¹

A. Factory Cost:

1. Direct materials

2. Direct productive labor

¹This breakdown may be altered to suit particular circumstances.

3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses²

(State basis of allocation)

Total Factory Cost

- B. Other manufacturing cost
- C. Miscellaneous direct expenses
- D. Indirect engineering expenses
- E. Expenses of distribution, servicing and administration
- F. Guarantee expenses

(b) It is agreed that the cost of production of the first% of items called for hereunder, hereafter referred to as the "preliminary run" will not necessarily be typical for the remainder of the contract. The cost of production of the next%, [199] hereafter referred to as the "test run" shall be used as the general basis for re-determination. Within days after the completion of the production of the "test run", the Contractor shall submit to the Contracting Officer separate statements of the actual cost of the production of the "preliminary run" and the "test run", itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and

²State separately the estimated amount of each of the following items included:

- (a) Normal depreciation.
- (b) Special amortization.

accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) If the actual cost of production of the preliminary run plus the cost of the production of the remainder of the items called for by the contract, as indicated by the actual cost of production of the "test run", is less than the total estimated cost stated in paragraph (a), the total price to be paid pursuant to Article I shall be reduced in the same ratio.

(d) Pending the redetermination of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the redetermination of such price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such redetermined price for such items shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or returned to the Government as directed by the Contracting Officer.

(e) If this contract contains an escalator clause (Price Adjustment), notwithstanding any provisions of such escalator clause which may be inconsistent herewith, that clause shall be understood to relate only to that portion of the production under the con- [200] tract which is not covered by the statements of actual cost required by paragraph (b) of this article. The blanks in the escalator clause will be filled in at the time of redetermination hereunder, and the month in which the redetermination is made shall be taken as the base month for such escalator

clause and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statements. For this reason the blanks in the escalator clause were not filled in at the time of the execution of this contract.

Attachment No. 2:

Article *Renegotiation.*

(a) The Contractor represents that the contract price provided in Article is based upon a total estimated cost of \$..... itemized as follows:¹

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses.²

(State basis of allocation)

Total Factory Cost

B. Other manufacturing cost

C. Miscellaneous direct expenses

D. Indirect engineering expenses

¹This break-down may be altered to suit particular circumstances.

²State separately the estimated amount of each of the following items included:

- (a) Normal depreciation.
- (b) Special amortization.

E. Expenses of distribution, servicing and administration

F. Guarantee expenses [201]

(b) Within days after the completion of the production of% of the items called for under this contract, the Contractor shall submit to the Contracting Officer a statement of the actual cost of the production of said percentage, itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) Upon the written request of either party, which request shall be made within days after the filing of the statement required by paragraph (b) hereof, the Contracting Officer and the Contractor will enter into negotiations and will attempt to agree upon a modification of the contract.

(d) Pending the renegotiation of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the renegotiation of the price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such renegotiated price for such items, if in the Government's

favor, shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or returned to the Government as directed by the Contracting Officer; if in the Contractor's favor, it shall be paid by the Government on a separate invoice or voucher.

(e) If this contract contains an escalator clause (Price Adjustment) the figures set forth therein and the terms thereof shall be controlling in the absence of a modification of the contract under this article. In the event of such a modification, the escalator clause shall be so modified as to relate only to that portion of [202] the production under the contract which is not covered by the statement of actual cost required by paragraph (b) of this article. In modifying the provisions of the escalator clause, the month in which the renegotiation occurs shall be taken as the base month, and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statement submitted under paragraph (b) hereof.

EXHIBIT I

JOINT RESOLUTION TO PROVIDE FOR THE
RENEGOTIATION OF CONTRACTS FOR THE
PRODUCTION OF WAR MATERIALS FOR
THE PURPOSE OF LIMITING PROFITS
THEREUNDER

Whereas it is imperative that effective measures be taken to limit the profits paid to contractors obtaining contracts for the production of war materials; therefore, be it

Resolved by the Senate and the House of Representatives of the United States, in Congress assembled, That—

1. The Secretary of War is directed to insert in any contract hereafter made by the War Department, which, in his judgment, may result in an excessive profit to the contractor, a provision for the renegotiation of the contract price at a period when the profits can be determined with reasonable certainty.

2. The Secretary of War is directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with the War Department, to require such contractor to renegotiate the contract price. This provision shall be applicable to all contracts hereafter made and to all contracts heretofore made, whether or not such contracts contain a renegotiation clause, provided that final pay- [203] ment has not already been made pursuant to such contract.

3. In renegotiating a contract price the Secretary of War shall not make allowance for any salaries, bonuses, or other compensation paid by the contractor to its officers or employees, in excess of a reasonable amount, nor shall

he make allowance for any excessive reserves set up by the contractor, and the Secretary of War shall freely use the powers of audit conferred upon him by existing law for the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been set up.

4. In addition to the powers conferred by existing law, the Secretary of War shall have the right to demand of any contractor who holds uncompleted contracts with the United States for the production of war materials in the aggregate amount of \$500,000 or more statements of actual costs of production and such other financial statements, at such times and in such form and detail as the Secretary of War may require.

5. The authority and discretion herein conferred upon the Secretary of War may be by him delegated to such individuals or agencies in the War Department as he may designate and he may authorize such individuals to make further delegations of such authority and discretion.

6. The foregoing provisions shall be applicable to the Secretary of the Navy in the case of contracts with the Navy Department, and to the Chairman of the Maritime Commission in case of contracts with that Commission. The powers conferred by paragraph 4 above shall be exercised by the War Department, the Navy Department, or the Maritime Commission, whichever holds the largest aggregate amount of uncompleted contracts for the production of war materials.

[Endorsed]: Filed Jan. 28, 1946. [204]

[Title of District Court and Cause]

AFFIDAVIT

Walker W. Lowry, being first duly sworn, deposes and says.

1. I am an attorney employed by the Department of Justice, Washington, D. C.

2. Attached hereto is a full, true and correct copy of the amended petition for redetermination of excessive profits filed in the Tax Court by Magnesium Products, Inc., (Docket No. 61-R).

WALKER W. LOWRY

Attorney, Dept. of Justice

Subscribed and sworn to before me this 9th day of January, 1946.

GLADYS E. McGAFFEY

Notary Public

My commission expires 9/30/48. [205]

COPY

The Tax Court of the United States

Docket No. 61-R

Magnesium Products, Inc., a corporation, Petitioner, vs. Henry L. Stimson, as Secretary of War of the United States of America, and Robert P. Patterson, as Under Secretary of War of the United States of America, Respondents.

AMENDED PETITION FOR REDETERMINATION
OF EXCESSIVE PROFITS UNDER RENEGOTIATION ACT

The petitioner above named hereby petitions for a redetermination of excessive profits under the Renegotiation Act as set forth in the Unilateral determination of the Under Secretary of War in his notice of "Determination of Excessive Profits" dated 6 June 1944, and as a basis for its petition alleges:

1. The petitioner is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business located at 1119 Santa Fe Avenue, Los Angeles, California. [206]
2. That this proceeding is one seeking a redetermination of alleged excessive profits under Section 403 of Title IV of Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress, approved April 28, 1942), as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress, approved October 21, 1942), by Section 1 of the Military Appropriations Act, 1944 (Public 108, 78th Congress, approved July 1, 1943), and by Public 149 (78th Congress, ap-

proved July 14, 1943), and as further amended by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress, enacted February 25, 1944) to the extent that Section 701(d) of the Revenue Act of 1943 makes the amendments made by Section 701 (b) effective as if they had been a part of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, on the date of its enactment, April 28, 1942, hereinafter referred to as Renegotiation Act.

3. That the "Unilateral Determination of Excessive Profits", (a copy of which is attached hereto as "Exhibit A" and is by this reference incorporated herein as though set forth in full at this portion of this petition) was mailed to petitioner on June 6, 1944.

4. That the alleged excessive profits are for the period beginning March 1, 1942 and ending on November 30, 1942 and that the amount thereof is \$250,000.00. [207]

5. That petitioner is engaged in the business of operating a jobbing foundry wherein it fabricates and sells magnesium alloy and castings; that all of the business done by petitioner during the period under review ending November 30, 1942, was with private individuals, firms and corporations and not with the United States of America; that petitioner has no contracts, as such, with any person, firm or corporation or with the United States of America; that all of its said business is and was done upon purchase orders, forwarded to petitioner by its customers; that all of the magnesium alloy sand castings fabricated and sold by petitioner, during the period under review, were sold below the maximum price which had been established and was in effect under the Emer-

gency Price Control Act of 1942 as amended and were sold at a price below the January 1, 1941 selling price.

6. The determination of the assailed excessive profits contained in "Exhibit A" hereto is based upon the following errors:

(a) The Under Secretary erred in refusing to take into consideration the corresponding profits made by petitioner in pre-war years;

(b) The Under Secretary erred in disregarding the contingent liability which exists for rejected castings; [208]

(c) The Under Secretary erred in disregarding the pricing policy followed by petitioner and the voluntary price reductions made by it since 1941;

(d) The Under Secretary erred in disregarding the comparative prices for the same product in the industry;

(e) The Under Secretary erred in disregarding the voluntary price reduction made by petitioner in July of 1943 whereby a saving of approximately \$70,000.00 to the airframe companies was effected;

(f) The Under Secretary erred in disregarding the fact of petitioner's low cost of production, low overhead and administrative costs;

(g) The Under Secretary erred in disregarding the fact that petitioner is entirely financed by its stockholders and that it has never borrowed from or been financially assisted by the government;

(h) The Under Secretary erred in refusing to give consideration to petitioner's contribution to the war effort in the development of the use of magnesium, or to the

furnishing of technical assistance, supplies and equipment to others engaged in fabricating magnesium castings in the war effort;

(i) The Under Secretary erred in eliminating from consideration an adequate reserve, as determined by good [209] accounting practices, against contingent liabilities and the cost of reconversion to peace time business.

7. The facts upon which the petitioner relies are as follows:

(a) An analysis of the earnings of petitioner corporation, during the period under review, is as follows:

Net Sales	\$1,326,940.37
Cost of Sales	784,743.29
<hr/>	
Gross Profit on Sales	542,197.08
Commissions Earned	3,368.10
Discounts Earned	1,104.29
<hr/>	
Net Profit on Sales	\$ 546,669.47
Federal Income Taxes	381,592.38
<hr/>	
Earnings for Year of 1942	\$ 165,077.09
Percent of Sales	12.5%

(b) The petitioner corporation has not earned an excessive profit during the period under review when consideration is given to the corresponding profits in pre-war years. Petitioner earned 27.3% in the year 1940 and 20.6% in the year 1941. The fact that the petitioner is entitled to as great a margin of profit as that obtained under competitive conditions in normal times has been completely ignored.

(c) Petitioner is subject to a contingent liability [210] for rejected castings. Approximately six months production of petitioner's castings are now in storage, x-ray laboratories and in the process of machining. As the demand slackens or a design change takes place, the air-frame companies will reject these obsoleted castings. This contingent liability is real and could very well exceed twice the amount of the sum proposed to be left to petitioner after renegotiation. This liability cannot be determined within the period of one year and no provision has been made under the proposed renegotiation for the protection of petitioner's stockholders in the event loss occurs.

(d) Petitioner has supplied castings in an open competitive market and has, since October 1941, consistently sold at a price below the O.P.A. ceiling as set by Maximum Price Regulation No. 125. In 1940 petitioner voluntarily established a blanket price for all magnesium castings of \$2.35 per pound; this price was made without regard to the difficulty of castings or intricacy of design; in 1941 petitioner voluntarily reduced the blanket price to \$2.30 per pound; in January of 1942 petitioner voluntarily reduced its price to \$2.25 per pound; in February of 1943 petitioner complied with the O.P.A. request for reduction of 3¢ per pound based upon its computation of saving due to the roll back in the ingot [211] price of magnesium of 2¢ per pound. This price of \$2.22 per pound was well below the ceiling price and far below the price charged by petitioner's competitors in this or any other market area.

(e) The petitioner, in July of 1943, voluntarily reduced the price of all castings to \$2.00 per pound thereby effecting a saving to its customers, for the balance of the

fiscal year, of approximately \$70,000.00. This saving more than offsets the amount of recovery sought by renegotiation and was made by petitioner as a means of settling this controversy.

(f) The petitioner corporation has been entirely financed by its stockholders who have assumed all of the risks; petitioner has never borrowed from nor been financially assisted by the government or any agency thereof.

(g) Petitioner has, during its entire history, co-operated with its competitors in furthering the war effort in the development of the use of magnesium and in the furnishing of technical assistance, supplies and equipment to other competing firms engaged in fabricating magnesium castings in the war effort.

8. That the petitioner herein has never signed, [212] agreed, subscribed or assented to said renegotiation or the determination of alleged excessive profits by the respondents or the amount thereof but on the contrary has expressly refused to agree thereto.

9. That petitioner is advised and alleges that, as and if applied to the petitioner or to the business of the petitioner, said Renegotiation Act and each and every section and subdivision thereof under which said Unilateral Determination was made are, and each of them is, void and unconstitutional as being violative of the Constitution of the United States and that neither of the respondents herein had the power or authority to make said Unilateral Determination of June 6, 1944 and that neither of the respondents have the power or authority to enforce said Unilateral Determination according to its terms or otherwise for the reason that said Renegotiation Act is un-

constitutional and void, without lawful effect and repugnant to the Constitution of the United States, in the following among other particulars, to-wit:

(a) As and if applied to the petitioner said Renegotiation Act is an unauthorized attempt to delegate legislative authority to the respondents and to the Secretaries of the various departments as set forth in said act, contrary and repugnant to Article I, Section 1 and Article II, Section 8, [213] Paragraph 18 of the Constitution of the United States of America and to Articles V, IX and X of the Amendments thereto;

(b) As and if applied to petitioner, said Renegotiation Act and its enforcement would deprive petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States of America;

(c) As and if applied to petitioner, said Renegotiation Act and its enforcement would take petitioner's property for public use without just or any compensation, in violation of the Fifth Amendment to the Constitution of the United States of America;

(d) As and if applied to petitioner, said Renegotiation Act and its enforcement is repugnant to the Tenth Amendment to the Constitution of the United States of America in that it attempts to exercise a power not delegated to the United States.

(e) As and if applied to the Petitioner, said Renegotiation Act and its enforcement is in violation of Article I, Section 1 and Article II, Section 8, Paragraph 18 of the Constitution of the United States of America and of the Fifth and Tenth Amendments thereto, in that by said

Renegotiation Act it is provided that "Whenever, in the opinion of the [214] Secretary of a department (including the Secretary of War) the profits realized or likely to be realized from any contract with said department or from any subcontract thereunder, whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price", and that upon said renegotiation "the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract"; that neither said Renegotiation Act nor any other provision of law sets forth or declares any rules, standard guide or policy by which said Secretary is to be guided in the administration of said Act or in the determination of what are or are not excessive profits other than the arbitrary order, whim or caprice of said secretary; that by said Act Congress has attempted to delegate to the secretary the power to refix contract prices and has directed, authorized and empowered him, by unguided opinion and without setting forth any standard gauge or rule, to determine what profits are excessive;

(f) As and if applied to the petitioner, said Renegotiation Act and its enforcement further violates said foregoing provisions of the Constitution and the Fifth and Tenth Amendments thereto in that it purports to vest in the secretary [215] the power to renegotiate contracts made and entered into between private persons, firms and corporations and to which contracts the government of the United States is not a party, and in instances where no privity of contract exists between the contractor or subcontractor and the United States;

(g) As and if applied to the petitioner, said Renegotiation Act is further repugnant to said Articles of the Constitution of the United States and of said Fifth and Tenth Amendments thereto, in that it provides that upon any renegotiation conducted and made and upon any order entered pursuant thereto by the secretary, said secretary may make a revision of said contracts renegotiated by reducing the contract price of said contract, but said Renegotiation Act contains no provision whereby the contractor can have his contract price raised in the event that such contract price did not produce a fair profit on the business done under said contract or any profit at all;

(h) As and if applied to the petitioner, said Renegotiation Act is further repugnant to said Articles of the Constitution and to said Fifth and Tenth Amendments thereto in that it does not provide for any equality of treatment as to all persons, firms or corporations whose contracts are made subject to the provisions of said Act, in the following [216] particulars, to-wit:

(1) That by the provisions of said Act the secretary is authorized, in his discretion, to exempt from some or all of the provisions of said Act "any contracts or subcontracts under which, in the opinion of the secretary, the profits can be determined with reasonable certainty when the contract price is established — — — when the period of performance under said contract or subcontract will not be in excess of thirty days;

(2) That by the provisions of said Act the secretary may exempt from the provisions of said Act a portion of any contract or subcontract during a specified period or periods if in the opinion of the secretary the provi-

sions of the contract are otherwise adequate to prevent excessive profits;

(3) That by the provisions of said Act the secretary is authorized to exempt contracts and subcontracts, both individually and by general classes and types;

(4) That said Renegotiation Act is made to apply only to contracts involving amounts in excess of \$100,000.00 and does not apply to contracts involving amounts less than \$100,000.00;

(i) As and if applied to the petitioner, said Renegotiation Act is further violative of said articles of the Constitution and Amendments in that it directs the secretary [217] in determining excess profits under any contract not to make any allowances for any salaries, bonuses or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount and not to make allowance for any excess reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable; that said Act does not contain any standard, guide or rule for the determination of what are reasonable salaries, bonuses or compensation or for the determination of what are or are not excessive or unreasonable reserves;

(j) As and if applied to the petitioner, said Renegotiation Act further violates said Articles of the Constitution and Amendments thereto in that it authorizes the secretary, without any rule or standard to guide his discretion to exempt from renegotiation contracts or portions of contracts made or to be performed during a specified period or periods of time, said period or periods of time to be fixed by the arbitrary action of the secretary;

(k) That in exercising the purported power to determine excess profits the Renegotiation Act does not contain any limitation upon or description of the character of the material or data which the secretary may consider;

(1) That said Renegotiation Act further violates [218] said foregoing provisions of the Constitution of the United States of America and Amendments thereto in that the Congress of the United States has provided other statutory enactments applicable to corporations which provide a uniform method to exact taxes at high rates upon corporate earnings which, because of the war, are beyond normal which statutory enactment is commonly known as the Corporation Income and Excess Profit Tax and that the Renegotiation Act is as and if applied to petitioner and its business a taxing measure and its enforcement will further tax petitioner's excess profits without any uniform standard or guide for the determination of such income as represents excess profits.

10. The foregoing specifications of errors are based upon information and belief of petitioner; in this regard petitioner alleges that it has never been given a statement of the findings of fact or reasons upon which said Unilateral Determination was made; in the event petitioner is furnished with a statement of the reasons and basis for said Unilateral Determination petitioner will ask leave of Court to amend this petition to set forth any additional specifications of error which might be revealed by any subsequent statement or finding by the Secretary.

Wherefore petitioner prays that this Honorable Court [219] may hear the proceeding and determine that petitioner has in fact earned no excessive profits during the period under review; that the Court order, adjudge and

decree that the Renegotiation Act as applied to petitioner is unconstitutional, null and void, and unenforceable and that petitioner have such other and further relief as may be just and proper.

RUFUS BAILEY

ROBERT M. L. BAKER

639 South Spring Street

Los Angeles 14, California [220]

[Verified.] [221]

[EXHIBIT A]

WAR DEPARTMENT

OFFICE OF THE UNDER SECRETARY

Washington

DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

Whereas, Magnesium Products, Inc. (hereinafter referred to as the Contractor), holds contracts and sub-contracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

Whereas, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its

fiscal year ended 30 November 1942, under said contracts and subcontracts; and

Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, Therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

That \$250,000 of the profits realized by the Contractor during its fiscal year ended 30 November 1942, under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue. [222]

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

6 June 1944

Robert P. Patterson
ROBERT P. PATTERSON
Under Secretary of War

APRAR-8

5-17-44

24-55147ABC

[Endorsed]: Filed Jan. 28, 1946. [223]

[Title of District Court and Cause]

AFFIDAVIT

K. L. Brazier, being first duly sworn, deposes and says:

1. I am a Lieutenant Colonel in the Finance Department of the Army of the United States and I am the Assistant in charge of the Special Financial Services Division of the Office of the Fiscal Director.

2. Attached to this affidavit are full, true and correct copies of the following documents.

(a) The order and determination of Robert P. Patterson, Under Secretary of War, dated June 6, 1944, determining the amount of excessive profits realized by Magnesium Products, Inc., during its fiscal year ended November 30, 1942.

(b) A withholding order dated September 6, 1944, from Robert P. Patterson, Under Secretary of War, to North American Aviation, Inc.

(c) A telegram dated October 14, 1944, from Robert P. Patterson to North American Aviation, Inc., amending the withholding order of September 6, 1944. [224]

(d) A telegram dated October 19, 1944, from Robert P. Patterson to North American Aviation, Inc., further amending the withholding order of September 6, 1944.

(e) A letter dated July 21, 1945, from R. P. Hueper, Acting Fiscal Director to North American Aviation, Inc., further amending the withholding order of September 6, 1944.

K. L. BRAZIER

Lt. Colonel, F. D.

Sworn to and subscribed before me this 8 day of January, 1946.

JOHN A. SULLIVAN

~~Notary Public~~

Major, (AG)

~~My commission expires [225]~~

COPY

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
Washington

DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

Whereas, Magnesium Products, Inc. (hereinafter referred to as the Contractor) holds contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

Whereas, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its fiscal year ended 30 November 1942, under said contracts and subcontracts; and

Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, Therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

That \$250,000 of the profits realized by the Contractor during its fiscal year ended 30 November 1942, under its

contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination

6 June 1944

(S) ROBERT P. PATTERSON

Robert P. Patterson

Under Secretary of War

SPRAR-8

5-17-44

24-55147 [226]

SPRAR

6 September 1944.

North American Aviation, Inc.,

Inglewood, California

Subject: Direction to Withhold from Magnesium Products, Inc., of Los Angeles, California, pursuant to the Renegotiation Act.

Gentlemen:

Pursuant to the authority vested in the Secretary of War under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and duly delegated to me, I found and determined on 6 June 1944 that certain of the prices and profits realized by Magnesium Products, Inc., during its fiscal year ended 30 November 1942 under contracts and subcontracts subject to renegotiation were excessive.

In accordance with the authority and duty to eliminate said excessive profits (after allowing to said Magnesium Products, Inc. credit for Federal taxes and provided in Section 3806 of the Internal Revenue Code) I hereby direct you to withhold for the account of the United States any and all amounts (not in excess of \$40,000 in the aggregate (otherwise due or which shall become due from you to said Magnesium Products, Inc.

This direction shall be effective immediately and shall continue in effect until further notice from me.

You are also directed to report in writing to the Chairman of the War Department Price Adjustment Board,

Room 3D 573, The Pentagon, any amounts which you may from time to time withhold for the account of the United States pursuant hereto.

Very truly yours,

ROBERT P. PATTERSON

Under Secretary of War

FF:hhb

COPY

[227]

72867

ASF, PRICE ADJUSTMENT BOARD RENEGOTIATION DETERMINATION SPRAR ROOM 3D 573, THE PENTAGON, WASHINGTON 25, D. C.

NORTH AMERICAN AVIATION, INC.

INGLEWOOD

CALIFORNIA

14 OCTOBER 1944

MY LETTER 6 SEPTEMBER 1944 DIRECTING YOU TO WITHHOLD \$40,000 FROM MAGNESIUM PRODUCTS, INC. FOR ACCOUNT THE UNITED STATES IS HEREBY AMENDED AS FOLLOWS:

YOU ARE TO CONTINUE TO WITHHOLD SUCH AMOUNTS AS WERE OTHERWISE DUE FROM YOU TO MAGNESIUM PRODUCTS, INC. AT THE CLOSE OF BUSINESS ON 14 OCTOBER 1944 WHICH AMOUNTS I UNDERSTAND TOTAL NOT LESS THAN \$24,462.24,

YOU ARE TO WITHHOLD NO ADDITIONAL AMOUNTS UNTIL 30 OCTOBER 1944 ON WHICH DATE YOU ARE TO RESUME WITHHOLDING IN ACCORDANCE WITH MY LETTER OF 6 SEPTEMBER 1944 UNTIL THE TOTAL OF AMOUNTS WITHHELD THROUGH 14 OCTOBER 1944 AND AFTER 30 OCTOBER 1944 IS \$33,500.

ROBERT P. PATTERSON

UNDER SECRETARY OF WAR

OFFICIAL

G. K. HEISS

COLONEL, ORDNANCE DEPARTMENT

EXECUTIVE ASSISTANT

DRStuart; fm

COPY

[228]

19 OCTOBER 1944

72868

ASF, PRICE ADJUSTMENT BOARD RENEGOTIATION DETERMINATION SPRAR ROOM 3D 573, THE PENTAGON, WASHINGTON 25, D. C.

NORTH AMERICAN AVIATION, INC.

INGLEWOOD

CALIFORNIA

REFERENCE YOUR TELEGRAM 17 OCTOBER FROM JOHNSON STOP MY TELEGRAM 14 OCTOBER RESPECT TO MAGNESIUM PRODUCTS, INC. WITHHOLDING IS HEREBY AMENDED TO

REFER TO TOTAL OF NOT LESS THAN \$16,866.43
IN LIEU OF \$24,462.24 STOP RESPECT COD DE-
LIVERY REFERENCE IS MADE TO LETTER
DATED 13 OCTOBER FROM MAGNESIUM PROD-
UCTS, INC. RUFUS BAILEY, SECRETARY, TO
DEPARTMENT OF JUSTICE WHICH AGREES
THAT DURING PERIOD BETWEEN 13 OCTOBER
AND 30 OCTOBER SALES TO YOU WILL BE ON
QUOTE CUSTOMARY CREDIT TERMS UN-
QUOTE END

ROBERT P. PATTERSON

UNDER SECRETARY OF WAR

OFFICIAL:

G. K. HEISS

COLONEL, ORDNANCE DEPARTMENT
EXECUTIVE ASSISTANT

DRStuart; fm

COPY

[229]

SPFEU 167/490428 Magnesium Products Inc.

21 July 1945

North American Aviation, Inc.

Inglewood, California

Gentlemen:

Receipt is acknowledged of your letter dated 6 July
1945, in which you state that you have withheld from
Magnesium Products Company, 1119 South Santa Fe

Avenue, Los Angeles 21, California, as of that date the sum of twenty thousand two hundred four dollars and three cents (\$20,204.03), pursuant to the withholding directive of the Under Secretary of War.

Reference is made to withholding order dated 6 September 1944, whereby you were directed by the Under Secretary of War, to withhold monies otherwise due Magnesium Products Company in an amount not to exceed forty thousand dollars (40,000), as amended. Such withholding order is hereby further amended in that the maximum amount to be withheld from Magnesium Products Company is decreased from forty-thousand dollars (40,000) in the aggregate to twenty thousand two hundred four dollars and three cents (20,204.03) in the aggregate.

It is now requested that you continue withholding the twenty thousand two hundred four dollars and three cents (20,204.03), until further advice is received from this office as to disposition to be made of the amount withheld.

This office appreciates your cooperation in the matter.

Sincerely yours,

R. P. HUEPER

Brigadier General, USA

Acting, Fiscal Director

[Endorsed]: Filed Jan. 28, 1946. [230]

[Title of District Court and Cause]

SUPPLEMENTARY AFFIDAVIT OF E. R. CLAYTON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California, County of Los Angeles—ss:

E. R. Clayton being first duly sworn deposes and says:

That he is now and continuously ever since the 6th day of December, 1938, has been the president of Magnesium Products, Inc., the plaintiff herein.

That all of the business done by plaintiff during the times herein mentioned, ending November 30, 1942, was with private individuals, firms and corporations and that all of its said business is and was done upon purchase orders, forwarded to plaintiff by its customers; that the plaintiff company had 447 contracts outstanding on November 30, 1942, and that the completed [231] work on these contracts as of that date amounted to \$438,833.73; that the sales alleged to be subject to renegotiation as determined by the Price Adjustment Board is \$966,352.11 which said figure represents the net sales from March 1, 1942 to November 30, 1942.

E. R. CLAYTON

Subscribed and sworn to before me this 21st day of September, 1946.

(Seal)

RUFUS BAILEY

Notary Public in and for said County and State

[Endorsed]: Filed Oct. 8, 1946. [232]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing before the Court without a jury on October 8, 1946, and the Court having denied the motion of plaintiff for summary judgment, and having denied the motion of intervenor, the United States of America, for summary judgment, and having considered the pleadings and the stipulations made and entered into in open court, and being now fully advised in the premises, now finds the facts and states the Court's conclusions of law as follows:

FINDINGS OF FACT

1. That at all times herein mentioned, plaintiff was and now is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Los Angeles, California; that at all times herein mentioned, defendant was and now is a corporation, organized and existing under and by virtue of the laws of the State [233] of Delaware, and was and now is doing business within the State of California at Inglewood, Los Angeles County, California; and that the matter in controversy in this suit exceeds the sum or value of \$3,000, exclusive of interest and costs.

2. During the year 1942, plaintiff was engaged in the manufacture of certain magnesium castings, all of which had a war end use. These magnesium castings were sold to defendant, North American and others, and as plaintiff well knew, they were used in the fabrication of aircraft and aircraft parts manufactured for and at the expense of the United States. After the enactment of the Renegotiation Act on April 28, 1942, plaintiff continued to enter into numerous purchase order contracts for the manufacture and sale of such castings and to make deliveries pursuant to those purchase orders.

3. After due notice to plaintiff, proceedings for the renegotiation of plaintiff's contracts and sub-contracts were had and conducted by representatives of the Secretary of War and thereafter, on the 6th day of June, 1944, the Under Secretary of War, acting under and by virtue of the Renegotiation Act and pursuant to authority delegated to him, duly determined in accordance with law, that of the profits realized by plaintiff during its fiscal year ended November 30, 1942, on its contracts and subcontracts subject to renegotiation, \$250,000 thereof were excessive profits.

4. The tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code is in the amount of \$184,376.63. This tax credit is computed upon the assumption that the profits determined to be excessive were returned as income by plaintiff for tax purposes, and that the appropriate taxes have been or will be paid on such profits.

5. That on or about September 6, 1944, the Under Secretary of War, acting pursuant to authority delegated to him under and by virtue of the Renegotiation Act, mailed to defendant an order directing the defendant to withhold for the account of the United States any and all amounts (not in excess of \$40,000 in the aggregate) otherwise due or which should thereafter become due from defendant to plaintiff, which said withholding order was thereafter duly modified or amended by telegrams and a letter sent by various representatives of the Secretary of War acting under and by virtue of the Renegotiation Act, and "[234] pursuant to authority delegated to them respectively, whereby the amount which defendant was ultimately ordered to withhold from plaintiff was reduced to the amount of \$20,204.03.

6. Pursuant to directions contained in the withholding order and amendments aforesaid, defendant, North American Aviation, Inc. has withheld for the account of the United States from amounts otherwise due plaintiff, the sum of \$20,204.03.

7. The amount due the United States from plaintiff on account of plaintiff's renegotiation indebtedness to the United States for its fiscal year ended November 30, 1942 is equal to or greater than the said sum of \$20,204.03 so withheld by defendant as aforesaid.

8. Defendant is not indebted to plaintiff on account of any of matters in issue in this case.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the parties and of the subject matter of this action.
2. That the Renegotiation Act, as amended, is a valid exercise of the power of Congress and is in all respects constitutional.
3. That plaintiff is not entitled to recover in this action.

It Is Ordered that judgment shall be entered in conformity herewith.

Dated: October 16, 1946.

J. F. T. O'CONNOR
Judge, United States District Court

Approved as to Form:

RUFUS BAILEY
BAILEY & POE

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 16, 1946. [235]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 4390-O'C

MAGNESIUM PRODUCTS, INC., a corporation, 1119
Santa Fe Avenue, Los Angeles 21, California,
Plaintiff,

v.

NORTH AMERICAN AVIATION, INC., a corpora-
tion, Inglewood, California, Defendant.

JUDGMENT

This cause came on regularly for trial before the Court without a jury on October 8, 1946, and in conformity with the Court's Findings of Fact and Conclusions of Law, it is

Ordered and Adjudged that plaintiff take nothing by its suit and that defendant go hence without *day*.

Dated this 16th day of October, 1946.

J. F. T. O'CONNOR

Judge, United States District Court

Approved as to form

RUFUS BAILEY

BAILEY & POE

Attorneys for Plaintiff.

Judgment entered Oct. 16, 1946. Docketed Oct. 16, 1946. Book COB 40, page 246. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Oct. 16, 1946. [236]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Circuit Court of Appeals:

Notice is hereby given that plaintiff, Magnesium Products, Inc., a corporation herein, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order denying plaintiff's motion for a summary judgment and from the final judgment in favor of defendant that plaintiff take nothing herein which said order and judgment was entered in this action on the 16th day of October, 1946, in Civil Order Book 40, page 246.

Dated: December 11, 1946.

BAILEY & POE

By Rufus Bailey

By Arlo D. Poe

Attorneys for Plaintiff [237]

[Affidavit of Service by Mail.]

[Endorsed]: Filed; mld. copies to deft. counsel, Dec. 11, 1946. [238]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 243 inclusive contain full, true and correct copies of Complaint for Money; Answer; Motion for Summary Judgment; Notice of Motion for Summary Judgment; Affidavit of E. R. Clayton in Support of Motion for Summary Judgment; Response to Certification and Motion by United States to Intervene; Notice; Affidavit of Service; Order Allowing Intervention by United States; Answer of the United States; Affidavit of H. Struve Hensel; Affidavit of Robert P. Patterson; Affidavit of Walker W. Lowry; Affidavit of K. L. Brazier; Supplementary Affidavit of E. R. Clayton in Support of Motion for Summary Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal; Statement of Points on Appeal and Order Extending Time for Filing the Record and Docketing the Appeal which, together with copy of reporter's transcript of hearing on October 8, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$27.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3rd day of March, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, October 8, 1946

Appearances:

For the Plaintiff: Bailey & Poe, by Rufus Bailey, 639 S. Spring Street, Los Angeles 14, California.

For the Government: Robert E. Wright, Assistant United States Attorney.

Los Angeles, California, Tuesday, October 8, 1946, 2:00 P. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 4390 Civil, Magnesium Products, Inc., a corporation, versus North American Aviation, Inc., a corporation.

The Court: Are both sides ready?

Mr. Wright: Yes, your Honor.

Mr. Bailey: Yes, your Honor.

Mr. Wright: I am not sure, your Honor, as to whether the record is clear on the rulings yesterday as to the motion for summary judgment. Upon reference to my file here I find that the intervenor, the United States of America, moved for a summary judgment. The motion was filed January 28th, 1946.

The Court: In order to keep the record straight, that should be denied in view of our proceedings today. Let the record so show. Exception allowed the government.

Mr. Wright: Then there was a motion made by plaintiff, Magnesium Products Inc. for a summary judgment.

The Court: That motion will be denied and exception allowed the moving party.

Mr. Wright: Now I take it we are at trial on the merits of the case?

The Court: That is right. [2*]

Mr. Wright: Concerning the facts it is stipulated that during the year 1942 plaintiff was engaged in the manufacture of certain magnesium castings, all of which had a war end use. These magnesium castings were sold to the defendant North American Aviation and others and as plaintiff Magnesium Products Inc. well knew, they were used in the fabrication of aircraft and aircraft parts manufactured for and at the expense of the United States.

After the enactment of the Renegotiation Act on April 28, 1942, plaintiff continued to enter into numerous purchase order contracts for the manufacture and sale of such castings and to make deliveries pursuant to those purchase orders.

After due notice to the plaintiff, proceedings for the renegotiation of plaintiff's contracts and sub-contracts were had by representatives of the Secretary of War, and thereafter on the 6th day of June 1944 the Under Secretary of War, acting under and by virtue of the Renegotiation Act and pursuant to authority delegated to him, duly determined in accordance with law that profits realized by plaintiff during the fiscal year ending November 30, 1942 on those contracts and sub-contracts

*Page number appearing at top of page of original Reporter's Transcript.

subject to renegotiation, \$250,000 thereof were excessive profits.

That the document annexed to the answer of Intervenor United States of America as Exhibit A is a carbon copy of the order of determination made and signed by the Under [3] Secretary of War on the 6th day of June, 1944.

That the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code is \$184,376.63. This tax credit is computed upon the assumption that the profits determined to be excessive were reported as income by plaintiff for tax purposes and that the appropriate taxes have been or will be paid on such profits.

On or about September 6, 1944 the Under Secretary of War mailed the defendant North American Aviation a directive to withhold from Magnesium Products Inc. of Los Angeles, California, pursuant to the Renegotiation Act. This withhold order was amended by telegram from the Under Secretary of War to the defendant North American Aviation dated October 14, 1944; by a further telegram dated October 19, 1944, and by a letter dated July 21, 1945.

That the documents annexed to the answer of the Intervenor the United States of America, marked Exhibits B, C, D and E are true copies of the withholding orders referred to.

That pursuant to these directives from the Under Secretary of War, defendant North American Aviation has withheld for the use and account of the United States from amounts otherwise due to plaintiff the sum of \$20,204.03.

That plaintiff has filed a petition in the tax court of the United States asking for a redetermination of the amount if any of its excessive profits for its fiscal year ending [4] November 30, 1942. The tax court has not as yet heard plaintiff's case or rendered any decision thereon.

That the said amount of \$20,204.03 now being withheld by defendant North American Aviation from plaintiff Magnesium Products pursuant to the withhold orders aforesaid represents amounts accrued to the credit of plaintiff as the result of its performance of the work provided for by the purchase orders aforesaid, all of which required the furnishing of materials and parts for the construction of airplanes for use by the United States in the promotion of the war effort.

Mr. Bailey: On that statement of facts, your Honor, we will so stipulate. Now, in addition to that there has been filed on the various motions for summary judgment an affidavit of E. R. Clayton on behalf of plaintiff, and there has been filed an affidavit of Robert P. Patterson and an affidavit of H. Struve Hensel on behalf of the United States.

We will stipulate that if these witnesses were called that they would testify substantially as they have in these affidavits.

Mr. Wright: And that is with the understanding, of course, that none of the facts set forth in any of the affidavits shall result in any way qualifying the stipulation as to the facts relating to the issues raised by the pleadings, which issues are now on trial. [5]

Mr. Bailey: Yes, it is so understood and stipulated.

Mr. Wright: Let it be further stipulated that the amount now due the United States on account of the

renegotiation indebtedness referred to in this stipulation is at least equal to or more than the amount of \$20,204.03 now being withheld by defendant North American Aviation, Inc.

Mr. Bailey: It is so stipulated.

The Court: This action was filed in this court on April 19, 1945 and has been at issue for some time, and since the filing of the action the Circuit Court for the Ninth Circuit in *Spaulding v. Douglas Aircraft Company*, 154 Fed. 2nd at 419 disposed of the issues which were involved in the action now before the Court. A rehearing was denied in the *Spaulding* case on April 17, 1946. It was the opinion of the court that the opinion of the Circuit Court was controlling in the present case and for that reason the court requested counsel for the parties to appear in court and argue if there was any difference in the present issue and the decision rendered by our Circuit Court. The attorneys have appeared in court and have cooperated with the court in reaching a conclusion in this matter.

Our Circuit Court declared the Act constitutional and that is binding on this court. Judgment will be rendered accordingly. Findings of fact, conclusions of law and judgment will be prepared by the Intervenor, the United [6] States.

When can we have those, gentlemen?

Mr. Wright: I expect to dictate them this afternoon, your Honor. I haven't had a chance to this moment.

The Court: Mr. Bailey is going away, is he not?

Mr. Bailey: Not until the weekend, your Honor. I will be available the balance of this week except tomorrow morning.

Mr. Wright: We can get together tomorrow afternoon, your Honor.

The Court: I thought probably you could start now and get the matter disposed of.

Mr. Wright: Well, I will go down and dictate them. I think we have a perfect understanding.

The Court: Yes. I will agree, gentlemen. I think you have done a very fine job.

Mr. Bailey: Thank you very much, your Honor. I appreciate your courtesy.

[Endorsed]: Filed Feb. 24, 1947. [7]

[Endorsed]: No. 11556. United States Circuit Court of Appeals for the Ninth Circuit. Magnesium Products, Inc., a corporation, Appellant, vs. North American Aviation, Inc., a corporation, and United States of America, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 4, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
Within and for the Ninth Circuit

No. 11556

MAGNESIUM PRODUCTS, INC., a corporation, 1119
Santa Fe Avenue, Los Angeles 21, California,
Plaintiff,

vs.

NORTH AMERICAN AVIATION, INC., a corporation,
Inglewood, California, Defendant.

APPELLANT'S STATEMENT OF POINTS

Appellant and plaintiff Magnesium Products, Inc., a corporation, intends to rely on appeal on the following points:

1. That the 1942 Renegotiation Act (Section 403 of Title IV of the Sixth Supplemental National Defense Appropriation Act, 1942, ((Public 528, 77th Congress, approved April 28, 1942)) as amended by Section 801 of the Revenue Act of 1942), is unconstitutional and void as and if applied to plaintiff.

(a) The Act delegates legislative and judicial power to the Secretary, and authorizes him to take property from citizens of the United States as his "opinion" may dictate.

(b) The Act is vague and uncertain.

(c) The Act denies procedural due process.

(d) The Act operates retroactively and operates so as to destroy existing contractual rights.

2. That said 1942 Renegotiation Act has been unlawfully and unconstitutionally applied and administered against plaintiff so as to deprive plaintiff of its property without due process of law.

(a) The Act only authorizes bargaining by the Secretary, and not a unilateral determination.

(b) The Secretary has treated as renegotiable purchase orders which were not subcontracts.

(c) Defendant has treated contracts in sums less than One Hundred Thousand Dollars (\$100,000) as subject to renegotiation.

BAILEY & POE

By Rufus Bailey

By Arlo D. Poe

Attorneys for Appellant

639 South Spring Street

Los Angeles 14, California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 10, 1947. Paul P. O'Brien,
Clerk.

No. 11,556

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGNESIUM PRODUCTS, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation, and
UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEES.

JAMES M. CARTER,

United States Attorney;

RONALD WALKER,

Assistant U. S. Attorney;

ROBERT E. WRIGHT,

Assistant U. S. Attorney,

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

Attorneys for Appellees.

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No. 11,556

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MAGNESIUM PRODUCTS, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation, and
UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEES.

Jurisdictional Statement.

Appellant filed its complaint in the District Court alleging that it is a California corporation; that appellee, North American Aviation, Inc., is a Delaware corporation; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000. The amount sued for is \$20,204.03.

Jurisdiction of the District Court is established by 28 U. S. C. 41. Jurisdiction of this court is established by 28 U. S. C. 225.

Statement of the Case.

The complaint sets forth two causes of action. The first cause of action is the common count for the agreed price of goods sold and delivered by plaintiff to defendant at its request. The second cause is the common count on an account stated.

The answer admits that defendant became indebted to plaintiff in the sum of \$20,204.03; that no part of said sum has been paid to the plaintiff; that demand has been made therefor; that defendant refuses to pay said sum or any part thereof to plaintiff because renegotiation had taken place between the Under-Secretary of War and the plaintiff pursuant to the provisions of the Renegotiation Act, for the purpose of eliminating excessive profits realized by the plaintiff during its fiscal year ended November 30, 1942, under its contracts and sub-contracts subject to renegotiation; that the Under-Secretary of War, on or about June 6, 1944, found and determined that \$250,000 of the profits realized by plaintiff during its said fiscal year, under its contracts and sub-contracts subject to renegotiation, were excessive; and that thereafter the Under-Secretary of War caused to be served on defendant a series of withholding orders requiring defendant to withhold for the account of the United States from moneys otherwise due or which thereafter became due from the defendant to the plaintiff, the sum of \$20,204.03, which sum plaintiff has withheld and still withholds, pursuant to said orders, and which said sum is the amount claimed by the plaintiff. [R. 2-25.]

Upon motion of the United States, pursuant to the provisions of the Act of August 24, 1937, 28 U. S. C. 401, and the provisions of Rule 24 of the Federal Rules of Civil Procedure, an order was entered permitting the United States to intervene. Thereupon the United States filed its answer setting forth seven defenses. [R. 48-60.]

The second defense set forth in the answer of the United States avers that the court has no jurisdiction of any issue as to which the Tax Court is given jurisdiction by Section 403(e) of the Renegotiation Act; that plaintiffs have filed a petition in the Tax Court for a redetermination but that the Tax Court has not as yet heard or decided plaintiff's case; and that this suit is premature because plaintiff has not as yet exhausted its Tax Court remedy. [R. 55.]

The fourth defense set forth in the answer of the United States avers the renegotiation and withholding orders substantially as set forth in the answer of the defendant and in addition thereto, avers that plaintiff has filed a petition in the Tax Court of the United States asking for a redetermination of the amount, if any, of its excessive profits for its fiscal year ending November 30, 1942, and that the Tax Court has not as yet heard plaintiff's case or rendered its decision thereon. [R. 56.]

At the trial the facts were stipulated as follows:

After due notice to the plaintiff, proceedings for the renegotiation of plaintiff's contracts and sub-contracts were had by representatives of the Secretary of War and

thereafter, on the sixth day of June, 1944, the Under-Secretary of War, acting under and by virtue of the Renegotiation Act and pursuant to authority delegated to him, duly determined in accordance with law that of the profits realized by plaintiff during the fiscal year ending November 30, 1942, on those contracts and sub-contracts subject to renegotiation, \$250,000 thereof were excessive profits; that the document annexed to the answer of intervenor United States of America as Exhibit A is a carbon copy of the order of determination made and signed by the Under-Secretary of War on the 6th day of June, 1944; that the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code is \$184,376.63; that pursuant to the Renegotiation Act the Under-Secretary of War mailed to the defendant North American Aviation, Inc., a directive to withhold moneys from Magnesium Products, Inc., pursuant to the Renegotiation Act, which order was amended by subsequent telegrams and letters; that pursuant to these directives from the Under-Secretary of War the defendant has withheld for the use and account of the United States from amounts otherwise due to plaintiff, the sum of \$20,204.03; that plaintiff has filed a petition in the Tax Court of the United States asking for a determination of the amount, if any, of its excessive profits for its fiscal year ended November 30, 1942; that the Tax Court has not as yet heard plaintiff's case or rendered any decision thereon; that said amount of \$20,204.03 now being withheld by defendant from plaintiff, pursuant to the

withholding orders aforesaid, represents amounts accrued to the credit of plaintiff as the result of its performance of the work provided for by purchase orders, all of which required the furnishing of materials and parts for the construction of airplanes for use by the United States in the promotion of the war effort; and that the amount now due the United States on account of the renegotiation indebtedness referred to in this stipulation, is at least equal to, or more than, the amount of \$20,204.03 now being withheld by defendant.

It was further stipulated:

“Mr. Bailey: On that statement of facts, Your Honor, we will so stipulate. Now, in addition to that there has been filed on the various motions for summary judgment, an affidavit of E. R. Clayton on behalf of plaintiff, and there has been filed an affidavit of Robert P. Patterson, and an affidavit of H. Sturde Hensel on behalf of the United States.

We will stipulate that if these witnesses were called, that they would testify substantially as they have in these affidavits.

Mr. Wright: And that is with the understanding, of course, that none of the facts set forth in any of the affidavits shall result in any way qualifying the stipulation as to the facts relating to the issues raised by the pleadings, which issues are now on trial.

Mr. Bailey: Yes, it is so understood and stipulated.” [R. 248-251.]

SUMMARY OF ARGUMENT.

I.

The Tax Court Has Exclusive Jurisdiction to Decide All Questions Presented by Appellant, Except the Question of the Power of Congress to Enact the Statute.

(a) The administrative procedure provided by the Renegotiation Act is constitutional.

(b) The rule requiring exhaustion of an administrative remedy is one of judicial administration—not merely a rule governing the exercise of discretion—and is applicable to proceedings at law as well as suits in equity.

II.

The Renegotiation Act Is Not Subject to the Constitutional Objections Advanced by Appellant.

ARGUMENT.

I.

The Tax Court Has Exclusive Jurisdiction to Decide All Questions Presented by Appellant Except the Question of the Power of Congress to Enact the Statute.

Section 403(e)(1) of the Renegotiation Act (Public Law 235, 78th Congress, 2nd Sess.) provides:

“Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day), after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have *exclusive jurisdiction*, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of

hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).” (*Italics added.*)

Appellant, whose fiscal year ended prior to July 1, 1943, is accorded the same remedy by Section 403(e)(2) of the Act.

In *Myers v. Bethlehem Corp.*, 303 U. S. 41, it was contended that rights guaranteed by the Constitution would be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Labor Relations Board. At page 50 the Court said:

“So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal, to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed

administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

At about the time appellant's brief was filed in this case, the Supreme Court, on June 16, 1947, filed its opinion in the case of *Aircraft & Diesel Equipment Corp. v. Hirsch*, No. 95, October Term 1946. In that case, Aircraft, while its petition for a redetermination of its excessive profits was pending and undisposed of in the Tax Court, sought a declaratory judgment, of the District Court, that the First and Second Renegotiation Acts are unconstitutional, and an injunction restraining defendants from taking steps (issuing withholding orders) to prevent payment of moneys owed to it by its customers-prime contractors. In that case the Supreme Court held that the doctrine of exhaustion of administrative remedies applies to such issues as statutory coverage and amount, and that on those issues the subcontractor could have no relief, either in equity or in a suit against the prime contractor, until, at least, after termination of the Tax Court proceedings.

The contentions made at pages 36 and 37 of appellant's brief: (a) that the Secretary has renegotiated purchase orders which were not sub-contracts, and (b) that the Secretary has renegotiated contracts in sums less than \$100,000, present questions of coverage—not open for decision by the District Court in this case. This Court so held in the *Pownall* case (159 F. (2d) 73).

(a) ADMINISTRATIVE PROCEDURE PROVIDED BY THE RENEGOTIATION ACT IS CONSTITUTIONAL.

It will be noted that Section 403(e) provides that the Tax Court, in considering cases presented to it under the Renegotiation Act, is controlled by the statutory provisions that control it in the case of a proceeding to redetermine a deficiency. An examination of the sections of the Internal Revenue Code referred to in Section 403(e) of the Act demonstrates that the authorized procedure provides for a full and fair hearing and determination of all matters of fact and that, through judicial review, it provides for the protection of all the legal rights of the petitioner, including any constitutional right which it may be entitled to invoke. While Section 403(e) of the Act does not specifically provide for judicial review of the Tax Court's determinations of questions of law, it seems clear, nevertheless, that it was not the intent of the Congress to abolish the jurisdiction of the Circuit Courts of Appeals (26 U. S. C. 1141) to review decisions of the Tax Court in cases brought pursuant to the Renegotiation Act. This proposition is demonstrated with convincing logic by the Court of Appeals of the District of Columbia in the case of *U. S. Electrical Motors, Inc., v. Jones*, 153 F. (2d) 134. This conclusion is also sustained by the reasoning in the case of *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337.

(b) THE RULE REQUIRING EXHAUSTION OF AN ADMINISTRATIVE REMEDY IS ONE OF JUDICIAL ADMINISTRATION—NOT MERELY A RULE GOVERNING THE EXERCISE OF DISCRETION—AND IS APPLICABLE TO PROCEEDINGS AT LAW AS WELL AS SUITS OF EQUITY.

The language of the caption is the language of the Supreme Court in its opinion in the case of *Myers v. Bethlehem Corp.*, 303 U. S. 41, set forth in note 9 at page 51 of the opinion. The court cites *First National Bank v. Board of County Commissioners*, 264 U. S. 450, 455, and *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343—both suits at law. It is submitted that these two cases sustain the proposition in support of which they are cited, and their logic sustains the Government's contention that the Tax Court has exclusive jurisdiction to decide, in the first instance, all questions presented by appellant, except the basic constitutional question of the power of Congress to enact the statute.

II.

The Renegotiation Act Is Not Subject to the Constitutional Objections Advanced by Appellant.

The Supreme Court decided, in *Aircraft & Diesel Corp. v. Hirsch*, that the subcontractor in that case had an adequate remedy at law by suit upon its contracts against its customers (prime contractors), and that in such suit the question of the constitutional power of Congress to enact the Act could be presented and determined.

In *Spaulding et al. v. Douglas Aircraft Co.*, 154 F. (2d) 419, this Court passed upon each of the constitutional questions presented by appellant and decided each contrary to appellant's contention. In *U. S. v. Pownall et al.*, 159 F. (2d) 73, this Court, upon a re-examination of the constitutional questions presented, adhered to its decision in the *Spaulding* case.

For the reasons above set forth, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant U. S. Attorney;

ROBERT E. WRIGHT,
Assistant U. S. Attorney,
Attorneys for Appellees.

No. 11,556

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MAGNESIUM PRODUCTS, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation, and
UNITED STATES OF AMERICA,

Appellees.

APPELLANT'S REPLY BRIEF.

FILED

JUL 25 1947

PAUL P. O'BRIEN,

CLERK

BAILEY & POE,

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No. 11,556

IN THE

United States Circuit Court of Appeals

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MAGNESIUM PRODUCTS, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation, and
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Appellees.

APPELLANT'S REPLY BRIEF.

The matters presented by appellees in their reply brief have all been discussed in the opening brief of the appellants with the exception of the case of *Aircraft and Diesel Equipment Corp. v. Hirsch*, decided by the United States Supreme Court, October term, 1946, 91 L. Ed. Adv. Ops. 1313. The appellees argue that this case is authority for the position that the subcontractor has no relief, either in equity or against the prime contractor, unless the Tax Court proceedings have been terminated. Such is not the case. The Supreme Court held that (91 L. Ed. Adv. Ops. at 1326), a subcontractor, regardless of the stage of the Tax Court proceedings, could sue at law

against its customers, the prime contractors. This type of action is not forbidden by the Renegotiation Acts and the Supreme Court held that all questions of constitutionality could be presented in such an action.

Therefore, the decision cited by appellees does not require the affirmance of the District Court judgment in this case, and this court does have jurisdiction to rule on the constitutionality of the act regardless of the status of the proceedings in the Tax Court.

Respectfully submitted,

BAILEY & POE,

RUFUS BAILEY,

ARLO D. POE,

CARL N. HUFF,

Attorneys for Appellant.

